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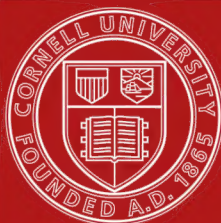
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COMMENTARIES
ON THE

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C. V.
OLD LANE

NON-CONTRACT LAW

AND ESPECIALLY AS TO

COMMON AFFAIRS NOT OF CONTRACT

OR THE

EVERY-DAY RIGHTS AND TORTS

BY

JOEL PRENTISS BISHOP

HONORARY DOCTOR JURIS UTRIVSQUE
OF THE UNIVERSITY OF BERNE

CHICAGO

T. H. FLOOD AND COMPANY

Law-Book Publishers

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PREFATORY EXPLANATIONS.

THE purpose of this volume is to set out, in compact form and condensed language, substantially after the manner of my recent enlarged work on "Contracts," the common-law reasonings and the conclusions of the courts upon the subject of its title; namely, "Non-Contract Law, and especially as to Common Affairs not of Contract, or the Everyday Rights and Torts."

I explain in the first chapter why the term "Non-Contract Law," instead of "Torts," is selected as the short name of the book. Its sphere extends beyond torts, which it includes, to whatever else is within a group of fundamental principles regulating things not bargained about. Therein it follows a natural division in the legal field, instead of driving a mere artificial furrow. And the consequence is, that it is clearer in elucidation and practically more useful than I could have made it upon the artificial plan.

In the first chapter also is stated the book-history of so much of this subject as is termed the "Law of Torts." The reader will there perceive that the subject has for many years occupied a foremost place in my thoughts. And I have constantly wished for a prolongation of my day of labor until I could see a fitting opportunity for presenting it to the professional public; provided, of course, that in the mean time no other author should

have treated it in a manner satisfying my conceptions. Since I first brought this subject within the sphere of my purposes, and failed to convince any publisher that it was a fit subject for a law book, several authors have written upon it. I do not wish to disparage their works; some of them are certainly worthy of great credit, and the poorest may be incomparably better than mine. But no one of them fills in any considerable measure my idea. So I have taken the risk of presenting now the book which has been thirty-six years in contemplation, and in some degree in preparation.

In the last work on "Torts" which I have seen, an English one by an able author, it is said "that a complete theory of torts is yet to seek, for the subject is altogether modern."¹ Another very able writer, an American, treats of "Torts" as not even a subject, but as a collection of disconnected subjects. And, so far as I have observed, the other books are of the one or the other of these two classes.

Now, when we extend "Torts" to the natural partition-line in the legal field, and make it "Non-Contract Law," all this obscurity vanishes. There is not in the entire law any other division so plain and distinct, so completely one subject, so absolutely governed by common fundamental principles, resting in natural reason and recognized by the courts from the earliest dawnings of the common-law jurisprudence, and never lost sight of or questioned, as this of non-contract law. This subject, in these lights, I have endeavored to present in this volume. And, if I am fortunate enough to find readers, I appeal to them to say whether it is not as thus stated, and even more emphatically than I thus claim.

¹ Pollock Torts, pref. vii.

In treating of this one subject, more beautiful than any other through which it has been my privilege to travel, — the road less obstructed by technical turnings and windings; the lights shining upon it from its sources in nature, in the cultivated moral and social sciences, and in the judicial reports, more clear and happily blending, — I could not forbear to pause now and then, yet briefly and I trust not too often, to admire our old and still young common law of reason. And if occasionally I have expressed indignation at modern attempts to smite it to its death and burial in statutes under the name of codification, I am sure the thoughtful reader will pardon me. But most of this matter has been carried forward to the closing chapters of the volume, so that readers who are afraid of being injured by it may stop when those chapters appear.

Descending now a little into detail, the most obvious consequence of arranging this entire one subject into one condensed work appears in its larger collection of legal doctrine than would otherwise have been possible within the same space. If, for example, we turn to the title Assault and Battery, or False Imprisonment, or Malicious Prosecution, or Slander and Libel, or any other of the like old titles in the law, each deemed of itself sufficient for a volume, we have in the chapter what is special to it; and in other chapters of this volume we have what, if those titles were treated as separate subjects, would require to be repeated as many times as there were subjects. And the avoidance of these repetitions is a vast economy of space.

Beyond which, the condensed style of treatment produces greater brevity than is apparent to one who has not given the matter a special and careful consideration.

What is thus stated is simply an obvious aspect of

the manner in which I have endeavored to render plain, in one volume, the great and wide one subject to which it is devoted. The reader who is familiar with our law treatises will discover other aspects, of which it is not necessary particularly to speak.

How far this sort of condensation is practicable in legal elucidations generally, I do not undertake to say. I have done in this volume what seemed to me judicious, within the measure of the capacity which God has given me. What are the abstract bounds, or what are the practical ones for any other author, I do not know.

One of the bounds which I have never been able to pass, pertains to the Index of Subjects. I can discover no way of so constructing an index that it will be no longer for a condensed than for a diffuse text. In the present instance, I have made the section heads serve the double purpose of helping the reader to the contents of the sections, and of constituting specifications under the italic lines, as explained in the introductory note to the Index. In this way, a large part of the space commonly occupied by our indexes is saved. As for the rest, I have avoided needless words and titles. I do not claim that in the present index there is absolutely nothing which could not have been omitted; but, beyond having it printed in the most compact form consistent with convenience in the use, I was without ability to prevent its extending over more pages than are commonly regarded as sufficient for a text of the like dimensions. I cannot forget that, for the every-day use of the practitioner, a thing not indexed is not in the book. And so copious is our language that no set of index-heads is possible to be arranged, of such sort that each searcher will know at

once for what word to look. I cannot better illustrate this than by an incident which occurred some years ago. From the Supreme Judges in one of our States I received a letter saying that a particular question within the range of my writings was giving them immense trouble. My book, on a careful search, had been found to contain nothing relating to it; and they asked me for any views or references which I might be able to supply. Being very desirous to assist them, I looked anxiously to see whether there was not, in my book, what had escaped their notice. Though it did not contain every case, I could see that if the Reports as published at the time when the last edition was prepared had so much as a single case on the particular topic, its conclusion was stated and the case was cited. To the extent of my ability, consulting every index word I could think of, then looking through the book and tracing the entire subject in the order of its minor topics, I carried on the search until I became absolutely assured that this matter was not there. Afterward, in making a new edition of the book, I found that this matter was in it, sustained by cited cases, and indexed. It stood in its right place, and the index word was the right one; both of which propositions being so plain that no mortal, competent or not, would deny either.

I know that not everything in the present work can be found through its index. Still I made it in person, as I do the index of every book which I write. And, conscious of its great importance, I did the best I could.

J. P. B.

CAMBRIDGE, April, 1889.

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THE NON-CONTRACT LAW.

BOOK I.

FUNDAMENTALS.

CHAPTER I.

OUTLINES AND DIVISIONS.

§ 1. **Generally of Divisions.** — The division of our law into various subjects, and of each subject into its particular titles and sub-titles, is matter simply of convenience to writer and reader; it constitutes no part of the law itself. The law is a seamless and partitionless whole. But it is a thing so vast that the mind can have no valuable comprehension of it, except in parts artificially separated from the mass for examination and study. And every writer is entitled to make for himself the divisions best adapted to his particular methods and objects. Practically, in most instances, there will be discovered a common professional usage, which it will be most convenient for both writer and reader to follow. As to the subject of this volume, —

§ 2. **Present Subject formerly.** — From the beginning of our common-law jurisprudence down almost to the present day, there has not been any such commonly-recognized division of the law as that to which this volume is devoted. We read in the books of various forms of actions for violations of non-contract legal duties, and of classified civil wrongs of this sort. We had, as we still have, Assault and Battery, Slander

and Libel, Deceit, Malicious Prosecution, Trespass, and so on, all pertaining to minor divisions within the subject of this volume.

§ 3. **Later — Tort.** — In 1859 was published the first treatise on the “Law of Torts.”¹ It was by Francis Hilliard.² It was, as all know, an American book. The English Addison on Torts appeared in 1860. Since then tort has become to the profession as familiar a subject as contract. And the expression “The Law of Torts,” when applied to this title of the law, has been largely accepted as signifying the same thing as “The Law of Contracts” when applied to its title. At the same time the word “tort” has not been otherwise much, if at all, bent from its original and proper meaning; namely, —

¹ Pollock, in his “Law of Torts,” says that the first text-book on this subject which he has “been able to find is a meagre and unthinking digest of ‘The Law of Actions on the Case for Torts and Wrongs,’ published in 1720, remarkable chiefly for the depths of historical ignorance which it occasionally reveals.” Pref. p. vii. I think this book should be passed over as though it did not exist.

² It was by publishers announced as in preparation some time before the day of publication, perhaps in the neighborhood of two years. I have just referred to an old catalogue containing an announcement of it, dated in 1857; but I have not before me such earlier catalogues as will determine whether or not this particular announcement was the first. From memory I can say that Addison on Torts, the first English publication on the subject, was also announced before it was published, but not until after the American announcement had appeared. I have some pretty distinct recollections regarding the introduction of this new title into our law. In 1853, after my “Marriage and Divorce” had appeared, and, urged by friends and publishers, I had determined to write more books, I proposed

to publishers a book on the Law of Torts. Presenting the subject, first to one publishing house, and then to every other law-book publishing house in the United States, and explaining the nature of the subject and the need of a book upon it, I received from all the reply, that there was no call for a work on that subject, and there could be no sale for it. “If,” said one, voicing the undivided opinion, “the book were written by the most eminent and popular author who ever lived, not a dozen copies a year could be sold.” I felt indignant at what seemed to me astounding stupidity, and expressed myself with no great restraint. Looking one day from my office window upon the street, in company with a legal friend, I said to him: “You see that man sweeping the street. Well, when I become too demented to swing a broom, I am going to set up in business as a great law publisher.” By what means publishers’ eyes were first opened, so that they ventured a book on Torts, I have never learned. But I have always regarded these facts as an instructive commentary on the popular idea that publishers can infallibly know in advance what books will sell and what will not.

§ 4. **Tort defined.** — The word “tort” means nearly the same thing as the expression “civil wrong.”¹ It denotes an injury inflicted otherwise than by a mere breach of contract; or, to be more nicely accurate, a tort is one’s disturbance of another in rights which the law has created either in the absence of contract, or in consequence of a relation which a contract had established between the parties.² Of course the wrong must be of a sort which the law redresses, not a mere infraction of good morals. Therefore, —

§ 5. **Compared with Breach of Contract.** — In precision of language, the word “tort,” when applied to its subject, signifies what the phrase “breach of contract” does in the law of contracts. So that the law of torts is, in truth, a mere subtitle in the non-contract law. And though practically the term “Law of Torts” has come to have a somewhat wider meaning with us, the author deems that to employ it as the title of the present work of still larger range would be inaccurate in language and misleading. Hence, —

§ 6. **Non-contract Law.** — The expression “Non-contract Law,” qualified by the words which stand with it on the title-page of this work, has been selected for its name. Theoretically open to some criticism, it is still believed to be the best which our language furnishes. Perhaps no one ever searched for a title in a case like this without a renewal of the old feeling, that human language is one of the imperfections of our earthly life. The greater part of our law, when accurately considered, is seen to be contract law. Such, for example, is most of the law of real property; it is greatly tangled with technical rules, which limit the power of parties to bargain in relation thereto, but so also in a less degree is the law of contract as respects personal property. And still practically no reader expects to find in a book entitled “Contracts,” an exposition of real-estate law. One bearing this title may enter into the law of partnership, of bills and notes, of landlord and

¹ Co. Lit. 158 b.

² And see post, § 73-77. Giving the reader these two definitions between which to choose, I do not see that I can

help him by citing others from the books; for, in this department, they do not abound in definitions of value.

tenant, and of various other like things, or it may limit itself to the more general principles, as the author chooses ; there being no usage determining this question. And it is not quite possible that any title shall define with certainty the bounds which the author may have assigned for his subject. In the present instance the title of this volume approaches as nearly to such defining as the author was able to make it.

§ 7. **Procedure.** — The law of pleading, evidence, and practice, collectively termed the law of the procedure, is a separate department ; and usage permits an author to treat it as one subject or three as may suit his convenience. Or it may be dealt with as a branch or branches of the substantive law. It will not be discussed, except now and then incidentally, in the present work.

§ 8. **Minor Divisions.** — The minor divisions of this work will sufficiently appear as we proceed. They are made, not to fit any theory, but for practical convenience, and for practical effect upon the reader's comprehension of the subject.

CHAPTER II.

THE FOUNDATION PRINCIPLES.

§ 9. **Why this Exposition.** — However far we proceed in interpreting and reconciling the reported cases on the subject of this volume, there will still remain contrarieties of decision not thus removable. Beyond which, in the judicial language, we shall discover differences of mere opinion, and unsettled doubts. And among doctrines apparently established, — or, at least, not dissented from, — are some, perhaps, contrary to just principle. Herein this department of the law does not differ greatly from the others, yet it calls for juridical culture. And it will be helpful in our attempts to discover the true path in these several classes of cases, to look first for the foundation principles upon which the entire subject rests. Not always, but in the greater number of instances, the self-evident larger truth will make plain how the particular minor question should be regarded. Moreover, if we would so learn what in the law is settled as to render it either abiding in our memories or of practical help in future causes, we must study it from its starting-places in fundamental doctrine. So that in every view this preliminary chapter will be helpful. Largely the principles are self-evident, requiring no authorities for their support. Thus, —

§ 10. **The Right to Exist.** — Every person is entitled to live as long as, without feeding on his fellows or otherwise injuring them, he can. This is a self-evident truth. Hence, —

§ 11. **Active — Do as Will.** — As no man can live by simply sitting down and breathing, every one has the right to be constantly active. And as necessarily each one is moved by impulses from his own mind, not another's, all are permitted to

obey, because they must, their several wills. The consequence is that, while one abstains from the purpose to injure another and, beyond this, is careful to avoid such injury, he cannot be called to account though an unintended harm results to the other. If the wind blows down a tree, the man alone on whom it falls must die; a neighbor, half a mile away, is not required to die with him. The falling of the tree is in law termed a visitation from God. So in society, men stand side by side; and, if the rightful and not incautious act of one casually brings harm to another, he who in doing it no more meant the harm than did the tree is not responsible; this, too, is a visitation from God. Were a man compellable to pay damages for what he rightfully and carefully did, when another casually suffered therefrom, he would not possess the privilege of governing himself and his destiny. And while this restraint injured him directly, it would bring indirect detriment to the race. Better is it for all that the law should keep the other vigilant by stimulating him to look out for himself. This doctrine, if not absolutely self-evident like that of the last section, is so nearly so as to require no authority for its support. Again, —

§ 12. **Accumulate Property.** — Each individual has the natural right to the fruits of his own labor. Therefore, if one has not occasion to use all to-day when he is well, he may lay up the surplus for to-morrow when he may be sick. Or, to express the idea more largely, every person has the right to accumulate property. Consequently —

§ 13. **Interfering with Another's Property.** — No one is permitted to take and use what is another's without his consent. So that, if two persons have property lying side by side, the law must respect and support the division line. The result whereof is that, if one of them appropriates to himself, however honestly, what is the other's, the latter has a cause of action against him. Without this rule there would be confusion of estates, and ownership would be obliterated. This rule is not in fact, however one's first impression of it may be, antagonistic to what is said in the section before the last. The right of redress for an unintended trespass does not con-

flict with one's right to pursue his own happiness and do what he will with his own. Dealing with one's neighbor's estate and dealing with one's own are two dissimilar things.¹ Once more, —

§ 14. **Limit of Use of Own.** — Among people living together on our crowded earth, there are necessarily more or less rights and interests of person and property in a measure depending upon one another. Two men, for example, own land lying side by side; and the division line extends downward, as the books express it, "to the centre of the earth." Now, it is not necessary to any reasonable use of the land of one of them that he should dig and carry it away as far down as the earth's centre, were there mechanical inventions enabling him to do it; thus ruining his neighbor's land, which would fall in and fill the space.² And here we have an illustration of a universal principle; namely, that, as individuals and their property exist not only separately but also in a combined whole, there is a use legitimate, therefore permissible, for every man's exertions and estate; but it is unlawful for one to employ either in a way to injure those parts of the combined whole which belong to others. In the complications of affairs the applications of this doctrine sometimes become difficult, but the doctrine itself is, if not absolutely, yet practically, self-evident.

§ 15. **Statutory Restraints.** — These views show how it is that the government may and does, from time to time, enact new laws, adding to the common-law restrictions upon the people as to the employment of their exertions and their property. Without a statute, the general understanding of mankind which, being judicially taken cognizance of by the courts, is enforced by them as law, puts upon the people many restraints of this sort. But their exact, proper limits may not always be palpable to natural reason, or men may so differ as to particular restraints that they will not become common law, or manners and needs may change with time; whereupon, in response to the public demand, legislation draws new

¹ Post, § 30.

² Transportation Co. v. Chicago, 99 U. S. 635, 645.

lines and fixes new bounds. This neither takes away the property of men nor makes them personally slaves ; it simply regulates the conduct of the individual for the good of that whole whereof he is a part.

§ 16. **Wilful Injury** — is a different thing. Though, as already explained, one who unintentionally does a casual harm to another may sometimes be exempt from liability to him, always he who means the injury is answerable in damages for what he inflicts, should it be of a sort and degree whereof the law takes cognizance.¹ For if men were to employ themselves in intentional mischief to one another, there would be an end of human well-being and happiness. We may here compare our civil jurisprudence with our criminal. Punishment, and not the redress of a private wrong, being the object of the latter, there can be no crime without an evil intent ; as, if one innocently believing that to be a fact which is not, does what the law makes lawful under such fact, but criminal under the unknown real circumstances, he is not punishable ; while, in civil jurisprudence, he will be suable or not according to the nature of the case.²

§ 17. **Other Principles.** — The foregoing are the chief fundamental principles. There are inferior ones which enter more or less into the subject of this work. They will appear as we proceed. To present them here in connection with the great pillars of our structure would not, it is believed, be sufficiently helpful to compensate for the space required.

§ 18. **Limits of Doctrine.** — The fact that the foregoing principles are fundamental does not prevent their having, like all others in the law, their practical limits. Something of the limits will be explained in the next chapter.

§ 19. *The Doctrine of this Chapter restated.*

The doctrine of private wrongs, other than breaches of contract, is traceable to a few obvious, foundation principles of natural right and justice ; not now speaking of minor ones,

¹ Post, § 142 et seq.

² 1 Bishop Crim. Law, § 286-291, 301-310.

not necessary to be here considered. With these principles the common law mingles some qualifying technical rules, derived from the nature of human jurisprudence, or from the practice of the particular tribunal. And statutes have added a few other rules qualifying the common law. The foundation common-law principles are, in substance, that every man is free to be active, pursuing his own interests and happiness and using his own property as he will, without being answerable for casual and unmeant injuries resulting to others; provided, that he does not, even unintentionally, deal with another's property as his own, that neither purposely nor carelessly does he so use his own as unnecessarily to prejudice another, and that neither negligently nor especially from an evil motive does he harm another in person or reputation in a manner and degree within the law's cognizance. Thus qualified, for all wrongs done to others with injurious intent, even for all which proceed from indifference whether harm is done or not, and for all evil consequences to others which result from the doer's want of care in conducting his own affairs, he is answerable to the sufferer. In the nature of things, these general principles are not alone adequate guides for all possible cases; but they enable us the more intelligently to trace the minuter lines which judicial decision has drawn, and to determine the true law where the adjudications differ or otherwise there is doubt.

CHAPTER III.

HOW THE FUNDAMENTAL PRINCIPLES ARE TECHNICALLY LIMITED.

- § 20, 21. Introduction.
- 22-34. Wrong and Injury must combine.
- 35, 36. Their Requisite Magnitude.
- 37-39. Must be Cause and Effect.
- 40-48. Proximity of Effect to Act.
- 49-53. Consent or Waiver.
- 54-65. Merits or Demerits of Party complaining.
- 66-69. Limitations from Procedure.
- 70, 71. The Tort being also a Crime.
- 72-78. Being also a Breach of Contract.
- 79. Doctrine of Chapter restated.

§ 20. **Law Practical — Hence Limitations.** — The law is a practical science. Resting in fundamental doctrines of right and truth, it takes cognizance also of the relations and necessities of practical life. And it interferes with the affairs of men, and redresses wrongs, not to the full extent which the Deity is supposed to do, but only so far as the exigencies of human government require. These observations and the matter of this chapter are only in part special to the subject of this volume, in part they concern equally the entire law. Therefore, and because illustrations of the propositions to be here laid down will appear in appropriate places throughout the work, it will not be necessary to extend the elucidations of this chapter much into detail.

§ 21. **What for Chapter and how divided.** — We shall consider, I. The Combining of Wrong and Injury; II. Their Required Magnitude; III. They must be to each other Cause and Effect; IV. The Proximity of the Effect to the Act; V. Consent or Waiver; VI. The Merits or Demerits of the

Party Complaining; VII. The Limitings of Doctrine by the Procedure of the Courts; VIII. The Tort being also a Crime; IX. Being also a Breach of Contract.

I. *The Combining of Wrong and Injury.*

§ 22. **Defined.** — For the law to furnish the redress we are considering, there must be an act which under the circumstances is wrongful, and it must take effect upon the person, the property, or some other legal interest of the party complaining. Neither one without the other will suffice.¹ Thus, —

§ 23. **In Conspiracy.** — Though a mere conspiracy² of two or more persons to injure another is a wrong, and it may be even indictable before any step is taken under it,³ yet it is an actionable civil tort only when the complaining party has suffered therefrom.⁴ Again, —

§ 24. **In Slander.** — If one utters words of another slanderous *per se*, in his hearing alone, or in a foreign language not known by the only other persons present,⁵ or if the words are not understood by the hearers in the evil sense meant,⁶ there is no tort because no injury. On the other hand, —

§ 25. **Run Over.** — One who suffers from being run over in the highway by another's horses, in a case where the latter is not in fault, can recover nothing of him; because here is simply damage on the one side without wrong on the other.⁷ Once more, —

¹ *Phillibrown v. Ryland*, 8 Mod. 351, 353; *Cowper v. Andrews*, Hob. 39, 43; *Smith v. Bowler*, 2 Disney, 153; *Occum Co. v. Sprague, &c. Co.* 34 Conn. 529; *Chatfield v. Wilson*, 28 Vt. 49; *McEndre v. Piles*, Litt. Sel. Cas. 101; *Morgan v. Bliss*, 2 Mass. 111; *Nichols v. Valentine*, 36 Maine, 322; *Estey v. Smith*, 45 Mich. 402, 404; *Quinlan v. Sixth Ave. Rld.* 4 Daly, 487; *Parker v. Wilmington, &c. Rld.* 86 N. C. 221, 227, 229; *Rex v. Pagham*, 8 B. & C. 355, 362.

² Post, § 353 et seq.

³ 2 Bishop Crim. Law, § 171, 181, 185, 192, 197.

⁴ Post, § 356; *Bishop Con.* § 521; *Savill v. Roberts*, 1 Ld. Raym. 374, 378, 1 Salk. 13, 3 Salk. 16, 5 Mod. 394.

⁵ *Broderick v. James*, 3 Daly, 481, 484; post, § 286.

⁶ *Myers v. Dresden*, 40 Iowa, 660. As to which, there appears to be some contrariety of opinion. Post, § 277.

⁷ *Quinlan v. Sixth Ave. Rld.* 4 Daly, 487. And see *Meyer v. Midland Pacific Rld.* 2 Neb. 319.

§ 26. **Injury Legal — Persuading to Revoke Will.** — The injury must be of a sort whereof the law takes cognizance: as, if one has made a will in my favor, and another deceitfully persuades him to revoke it, I can have no action against him; since I was deprived only of a gift, not injured in any legal right.¹ In like manner —

§ 27. **Advice.** — The act of wrong must be of a sort within the law's cognizance; as, if one gives another gratuitous advice, he is not responsible for ill which may come from following it.² A somewhat different illustration is that of —

§ 28. **Receiving One Escaped.** — If one arrested on civil process escapes from the officer, another who afterward without complicity in the escape receives him, is not liable to the creditor; for, before the receiving was done, the rights of the parties had become fixed, the officer made liable, and from this further act the creditor has not suffered.³

§ 29. **Nature of Injury.** — The required nature of the injury will depend on the sort of case. Thus, —

§ 30. **Trespass to Property.** — As suggested in another chapter,⁴ the law must and does give its utmost protection to property rights. Therefore a trespass, or any other analogous interference, done by one to any sort of property of another, however innocent the act, and however void of detriment appreciable in dollars and cents, is an injury for which the law will give at least nominal damages. The doer's mere wrongful contact with the thing legally suffices; and, though the complaining party may show more if he can, it will be only to increase the verdict.⁵ This rule applies to —

§ 31. **Every Right — (Slander — Vote).** — A wrong done to any tangible right recognized by the law imports injury; and, where only such wrong with no actual injury is shown, the

¹ *Hutchins v. Hutchins*, 7 Hill, N. Y. 104.

² *McCausland v. Cresap*, 3 Green, Iowa, 161.

³ *Seehorn v. Darwin*, 1 Tread. 196, 198, 3 Brev. 282.

⁴ Ante, § 13; post, § 101, 819.

⁵ *Tillotson v. Smith*, 32 N. H. 90;

Blanchard v. Baker, 8 Greenl. 253; *White v. Griffin*, 4 Jones, N. C. 139; *Woodman v. Tufts*, 9 N. H. 88; *Hollins v. Fowler*, Law Rep. 7 H. L. 757; *Williams v. Esling*, 4 Barr, 486; *Stowell v. Lincoln*, 11 Gray, 434; *Munroe v. Stickney*, 48 Maine, 462; *Champion v. Vincent*, 20 Texas, 811.

party may have, at least, nominal damages in vindication of the right.¹ For example, slander by words actionable *per se* justifies a verdict for damages though none are specifically proved.² And election officers, in any manner depriving of voting one who is entitled to vote, are civilly answerable to him;³ though, by some opinions, and in some of our States, to render them so, their functions being deemed judicial, their actions must be also malicious.⁴ In cases of another sort,—

§ 32. **Actual Damage.**—Where there is not even a technical disturbance of a right, though there is a wrong, there is nothing to redress. In such a case, until the wrong has progressed to actual damage, the tort is incomplete, and no action for it can be maintained. Thus,—

§ 33. **Fraud.**—Though fraud is a wrong, one on whom it is practised can recover nothing therefor until it has injured him,⁵ or disturbed some right of his.⁶ And—

§ 34. **Negligence**—gives no action to one menaced thereby, until he has suffered.⁷

II. *The Required Magnitude of the Wrong and Injury.*

§ 35. **The Doctrine**—of this sub-title is embodied in the maxim, *De minimis non curat lex*, the law does not concern itself about trifles.⁸ In another work,⁹ the author explained the effect of this doctrine in the criminal law. It is in sub-

¹ Embrey v. Owen, 6 Exch. 353; Whipple v. Cumberland Manuf. Co. 2 Story, 661; Bagby v. Harris, 9 Ala. 173; Paul v. Slason, 22 Vt. 231; Cory v. Silcox, 6 Ind. 39; Wright v. Stowe, 4 Jones, N. C. 516; Little v. Stanback, 63 N. C. 285; Bassett v. Salisbury Manuf. Co. 8 Fost. N. H. 438; Webb v. Portland Manuf. Co. 3 Sumner, 189.

² Yeates v. Reed, 4 Blackf. 463.

³ Ashby v. White, 2 Ld. Raym. 938; Larned v. Wheeler, 140 Mass. 390; Bacon v. Benchley, 2 Cush. 100; Green v. Shumway, 39 N. Y. 418; Goetcheus v. Matthewson, 61 N. Y. 420; Murphy v. Ramsey, 114 U. S. 15.

⁴ Bishop Stat. Crimes, § 805, 806;

Keenan v. Cook, 12 R. I. 52; Jenkins v. Waldron, 11 Johns. 114, 120; Butler v. Kent, 19 Johns. 223, 229; Harman v. Tappenden, 1 East, 555.

⁵ Bish v. Van Cannon, 94 Ind. 263; Parker v. Armstrong, 55 Mich. 176; Dudley v. Briggs, 141 Mass. 582; Fuller v. Robinson, 86 N. Y. 306; Wittich v. Pensacola Bank, 20 Fla. 843; Freeman v. Venner, 120 Mass. 424.

⁶ Blofeld v. Payne, 4 B. & Ad. 410; Marsh v. Billings, 7 Cush. 322; Thomson v. Winchester, 19 Pick. 214.

⁷ Musser v. Maynard, 55 Iowa, 197.

⁸ Broom Leg. Max. 2d ed. 105.

⁹ 1 Bishop Crim. Law, § 212-229.

stance the same in the law of torts, and it pervades every department of our jurisprudence.

§ 36. **Damage and Wrong, contrasted.** — It is little else than repeating what is said in the last sub-title to add here, that the minuteness of the actual damage suffered, though less than the smallest coin,¹ will not defeat an action of tort; a nominal sum, if no more, may be recovered.² But the maxim requires the wrongful act to be of a magnitude whereof the law can properly take notice.³ It would be useless to anticipate here the many illustrations of this proposition to occur throughout the volume. We shall see that, in various circumstances, the degree or intensity of an evil-doing will determine the doer's liability or its amount, in a way which, departing from the terms of our maxim, we may express thus, — The law, seeking practical justice, disregards the smaller things which constitute the mere common frictions of life, and extends its remedies only to those substantial derelictions, an interference wherewith accords with its dignity and beneficent nature.⁴

III. *The Wrong and Injury must be Cause and Effect.*

§ 37. **Doctrine defined.** — It is no ground of action that one person has done a wrong and another has suffered an injury, unless the latter is a product of the former. To sustain a suit, the two must be cause and effect.⁵ Thus, —

¹ 1 Bishop Crim. Law, § 224.

² Mellor v. Spateman, 1 Saund. Wms. ed. 339, note at p. 346 a; Cory v. Silcox, 6 Ind. 39; Wright v. Stowe, 4 Jones, N. C. 516; Little v. Stanback, 63 N. C. 285; Delaware, &c. Canal v. Torrey, 9 Casey, Pa. 143, 149; Blodgett v. Stone, 60 N. H. 167.

³ Fullam v. Stearns, 30 Vt. 443; Demarest v. Hardham, 7 Stew. Ch. 469.

⁴ Should the reader wish to see more of illustration at this stage of his investigations, he is referred to Workman v. Worcester, 118 Mass. 163; Steinbach

v. Hill, 25 Mich. 78; Brown v. Bridges, 31 Iowa, 138; Taylor v. Grand Trunk Ry. 48 N. H. 304; Watson v. Philadelphia, 12 Norris, Pa. 111.

⁵ Harlan v. St. Louis, &c. Ry. 65 Mo. 22; Karle v. Kansas City, &c. Rld. 55 Mo. 476; Norton v. Ittner, 56 Mo. 351; Ming v. Woolfolk, 116 U. S. 599; Harris v. Brisco, 17 Q. B. D. 504; Marshall v. Hubbard, 117 U. S. 415; Zier v. Hofflin, 33 Minn. 66; Cunningham v. Bay State Shoe and Leather Co. 93 N. Y. 481; May v. Princeton, 11 Met. 442, 444.

§ 38. **Railroad.** — If in the running of railroad cars some duty is neglected, — as, if there is not the needed headlight,¹ or the whistle or bell is not sounded,² or if the speed is too great,³ or a due signal is not given,⁴ or a required signboard at a crossing is not erected,⁵ — and one suffers an injury simultaneous with the wrong, yet it is not traceable to this cause, he can maintain no action against the railroad.

§ 39. **Two Causes.** — When the injury proceeds from two causes operating together, the party putting in motion one of them is liable the same as though it was the sole cause.⁶ This is one form of a universal principle in the law, that he who contributes to a wrong, either civil or criminal, is answerable as doer. And it is immaterial to this proposition whether that to which he contributes is the volition of a responsible person, or of an irresponsible one, or whether it is a mere inanimate force, or a force in nature, or a disease.⁷ If two

¹ Glenn v. Columbia, &c. Rld. 21 S. C. 466.

² Indianapolis, &c. Rld. v. Blackman, 63 Ill. 117; Chicago, &c. Rld. v. McDaniels, 63 Ill. 122; Wakelin v. London, &c. Ry. 12 Ap. Cas. 41.

³ Evans, &c. Fire Brick Co. v. St. Louis, &c. Ry. 17 Mo. Ap. 624; Lockwood v. Chicago, &c. Ry. 55 Wis. 50.

⁴ Gould v. Chicago, &c. Ry. 66 Iowa, 590; Parker v. Wilmington, &c. Rld. 86 N. C. 221, 227, 229.

⁵ Field v. Chicago, &c. Ry. 14 Fed. Rep. 332.

⁶ Ricker v. Freeman, 50 N. H. 420; Lane v. Atlantic Works, 107 Mass. 104; Atkinson v. Goodrich Transp. Co. 60 Wis. 141; Ransier v. Minneapolis, &c. Ry. 32 Minn. 331; Campbell v. Stillwater, 32 Minn. 308; Lynch v. Nurdin, 1 Q. B. 29; Powell v. Deveney, 3 Cush. 300; Illidge v. Goodwin, 5 Car. & P. 190; Barrett v. Third Ave. Rld. 45 N. Y. 628. Query as to Tutein v. Hurley, 98 Mass. 211.

⁷ 2 Bishop Crim. Law, § 637-639; Hooksett v. Amoskeag, &c. Co. 44 N. H. 105; Weick v. Lander, 75 Ill. 93; The Atlas, 93 U. S. 302; The Juniata, 93

U. S. 337; The Washington, 9 Wal. 513; Scott v. Hunter, 10 Wright, Pa. 192. One who, as author, practitioner, or judge, should forget for a moment that the words of judicial decisions and the law are things often quite diverse, would be pretty likely to find himself stumbling. As to the doctrine of this section, I observe in an opinion of the Massachusetts court the following, from that pre-eminently able judge, Shaw, C. J.: "The general rule of law, we understand, is, that where two or more causes concur to produce an effect, and it cannot be determined which contributed most largely, or whether, without the concurrence of both, it would have happened at all, and a particular party is responsible only for the consequences of one of these causes, a recovery cannot be had, because it cannot be judicially determined that the damage would have been done without such concurrence, so that it cannot be attributed to that cause for which he is answerable." Even Thomas, J., who dissented from the conclusion of the majority, did not challenge this proposition, but argued on the supposition of its being true.

sane men and an insane one, standing together, see a fourth person looking into the rapids above Niagara Falls, and the first sane one passes a club to the second, both having the murderous intent, and the second hands it to the lunatic, who pushes with it the fourth person into the stream, and the latter is carried over the Falls and dies, each of the sane persons has murdered the fourth, precisely as though unaided he had strangled him with a rope. Thus it is as the law views the case; though, according to the outward fact, neither of the two did anything except to co-operate with the other and with the lunatic, and with an immense mass of water, and with the force given it by gravitation; and if we strike out any one of the co-operating forces, whether a responsible or irresponsible one, there ceases to be any harm done.¹

IV. *The Proximity of the Effect to the Act.*

§ 40. **The Doctrine** — of this sub-title is a branch of the larger one before laid down, that the act of wrong must be of a magnitude justifying the law's interference.² Like the larger, it is the subject of a familiar maxim. The present one is, *In jure non remota causa sed proxima spectatur*, in law the immediate and not the remote cause of any event is regarded.³ More minutely, —

§ 41. **In another Form.** — This maxim, like many others, fails to embody with much exactness the idea actually controlling the decisions which nominally proceed from it. Nor

Marble v. Worcester, 4 Gray, 395, 397, 406. And the same thing is echoed, referring to this case, in *Baltimore, &c. Rld. v. Reaney*, 42 Md. 117, 136. Now, there cannot be the slightest doubt that it is not true, for the whole law is opposed to it. If fifty men combining upset by their united strength another's building, too heavy for any one alone, and only one is sued, so that it is certain he could not have done the mischief single-handed, there is not in all the books a case which can be cited for his acquittal. All hold him to be responsible. Yet it is one of the marvels

that, when a judicial blunder like this is made, — a mere blunder, having nothing in the law to rest upon, — judges coming after will take it up and repeat it, and text-writers will perpetuate it, without expending one thought as to whether or not it is sound in law. The next step is to decide cases upon it, and thus our law becomes deformed.

¹ See post, § 450-453.

² Ante, § 35, 36.

³ *Broom Leg. Max.* 2d ed. 165; *Salem Bank, v. Gloucester Bank*, 17 Mass. 1.

do the words of judges upon this matter always quite accord with their adjudications. Nor yet is it possible there should be any such enunciation of this doctrine as will furnish alone the practical guide needed for every sort of case. But with proximate accuracy we may define the immediate cause, which is adequate to charge the party putting it forth, to be any wrong sufficient in magnitude for the law to take cognizance of it, wherefrom, operating either alone or in conjunction with anything else, the injury comes as a first, final, or intermediate consequence. And the inadequate, remote cause, which is not sufficient to charge the party, we may define to be one which has so far expended itself, that its influence in producing the injury is too minute for the law's notice; or a cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof. — To illustrate, —

§ 42. **Independent Force taking Occasion — (Natural and Probable).** — If, after the cause in question has been in operation, some independent force comes in and produces an injury not its natural or probable effect, the author of the cause is not responsible.¹ Thus, —

§ 43. **Instances — (Railroad and Highway Accidents).** — A railroad train was forty-five minutes late, then came a gust of wind which threw it from the track and injured a passenger; here, though it would have escaped the gust of wind had it been on time, yet as the accident was neither the natural nor probable consequence of the delay, and only an independent force took advantage of it, the road was not liable to the passenger.² Again, one removes a fence from beside a railroad, another's cattle straying upon the road are killed by the negligent running of trains, and the road is compelled to pay for them; here the person removing the fence is not liable over to the road, because its carelessness was not the natural or probable consequence of his act, but was an independent der-

¹ Fairbanks v. Kerr, 20 Smith, Pa. 86; ² McClary v. Sioux City, &c. Rld.
Gilman v. Noyes, 57 N. H. 627; Seale 3 Neb. 44. An illustrative case similar
v. Gulf, &c. Ry. 65 Texas, 274; Mil- is Bodkin v. Western Union Tel. 31
waukee, &c. Ry. v. Kellogg, 94 U. S. 469. Fed. Rep. 134.

eliction of its own whereof it could not complain.¹ Again, a town having the care of a highway neglects to remove a heap of ashes, a sleigh is overturned by it and the horses run six miles and are killed by a railroad locomotive; without the town's fault the accident would not have occurred, yet it is not liable, because the killing was from a force independent of the obstruction, and not its natural or probable consequence.² Once more, a railroad passenger was wrongfully removed from the train by the conductor who supposed he had no ticket, he left behind him a pair of race-glasses, which did not fall into the hands of the railroad people, but were otherwise lost; the leaving of them was the passenger's own carelessness, and though he would not have left them but for the road's wrong, it was not liable for their value, since his carelessness was not the natural or probable consequence of its wrong.³ These are sufficient illustrations to make the doctrine and its limits plain, but the books are full of them.⁴ The more common judicial expression is, that the injury in these cases is too remote, or that it is not sufficiently proximate to the cause.

§ 44. **Force Exhausted.** — What in a previous sub-title was said of things too small for the law's notice explains that, at a point in the progress of the unlawful force not definable by exact words, it may have so far exhausted itself and become overborne by other forces as not to be deemed the legal cause of an injury which follows at such place. This was so where the carelessness of a railroad injured a passenger, resulting in his insanity. Eight months afterward he committed suicide. The road was held not to be responsible for the death, because it was too remote an effect of its wrong. "The argument," said Miller, J., "is not sound which seeks to trace this immediate cause of the death" — namely, the suicide — "through

¹ Louisville, &c. Rld. v. Guthrie, 10 Lea, 432.

² West Mahanoy v. Watson, 2 Am. Pa. 574.

³ Glover v. London, &c. Ry. Law Rep. 3 Q. B. 25.

⁴ For example, White v. Conly, 14 Lea, 51; Adams v. Lancashire, &c. Ry.

Law Rep. 4 C. P. 739; Doggett v. Richmond, &c. Rld. 78 N. C. 305; Selleck v. Lake Shore, &c. Ry. 58 Mich. 195; Lowery v. Western Union Tel. 60 N. Y. 198; Jackson v. Nashville, &c. Ry. 13 Lea, 491; Pittsburgh, &c. Ry. v. Staley, 41 Ohio State, 118; Donovan v. Texas, &c. Ry. 64 Texas, 519.

the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment, to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that 'great first cause least understood,' in which the train of all causation ends."¹ Again, an illustration not quite so apt as this, one having undertaken for a fixed sum to support a town's paupers in sickness and in health, another assaulted and so beat a pauper as to increase the expense; but it was held that the former person could not recover of the latter such increased expense. It was "too remote and indirect."²

§ 45. **Enough of Force continuing.** — We now come to the most common form of the doctrine. In flat defiance of one half the terms of our maxim, that the law regards "the immediate and not the remote cause," the adjudications hold no cause to be too remote so long as enough of its original force remains for the law's cognizance, provided the injury is a natural and probable consequence of the force. Many of the older decisions on this subject are to the form of the action; namely, whether it should be trespass or case, — a distinction which the reformed pleading in most of our States has abolished. In general terms, the rule was that the action should be trespass when the injury comes immediately from the force, but case when it is mediate and consequential.³ An action might fail because brought in trespass when it should be case. But, after some doubt of the form of the action, trespass against one who threw a lighted squib, which put out the plaintiff's eyes, was sustained under the following circumstances. The defendant threw the squib into an open market-house where there were many people; it fell upon the standing of Yates, and another there instantly, to prevent injury to himself and Yates, threw it across the market-house and it fell upon the standing of Ryal; who instantly, for the same reason as before, sent it to another part of the market-house, and it

¹ *Scheffer v. Washington City, &c.* v. Hoffin, 33 Minn. 66; *Austin v. Barrows*, 41 Conn. 287. Rld. 105 U. S. 249, 252.

² *Anthony v. Slaid*, 11 Met. 290, 291. For further illustrations see *Clifford v. Cochrane*, 10 Bradw. 570; *Zier* 138; note to *Scott v. Shepherd*, post, in 1 Smith Lead. Cas.

there took effect upon the plaintiff. The intermediate throwings, it is perceived, were from an impulse natural and to be expected; so that the disastrous result, though "remote," was deemed a product of the original cause.¹ That the thrower of the squib was properly held liable to the person finally injured was never doubted, and the doctrine of this case is accepted as law in all our States. Thus —

§ 46. **Modern Illustrations.** — Where a defect in a highway causes a traveller's load to be overturned, frightening his horses, and they run ninety rods and collide with and injure another traveller, the latter may recover his damages from the town responsible for the condition of the highway; the result being a natural product of the cause.² In a quarrel with a boy in the street, one followed him with a pickaxe into another's store; there the boy, in striving to get away, knocked out a faucet from a cask of wine whereby a quantity of it was wasted; and the loss from the faucet being a not improbable consequence of the unlawful and threatening pursuit of the boy, the pursuer was held to be liable therefor.³ If a man sells a horse under the false representation that it is safe to drive and not afraid of cars, the buyer may compel him to pay for injuries resulting from its taking fright at the cars and running away.⁴ One's statement of his financial condition to a mercantile agency, and by it communicated to a third person, brings the same liabilities as though made to the person directly.⁵ Through the negligence of an elevated railroad, fire from the locomotive fell to the street on a horse and its driver; it, frightened, ran away with the wagon. The driver, in attempting to stop the horse, reined it against the curbstone and injured a person on the sidewalk. Thereupon the latter was held entitled to maintain an action against the road, without regard to whether or not the driver

¹ *Scott v. Shepherd*, 2 W. Bl. 392, referring to *Langridge v. Levy*, 2 M. & W. 519, 4 M. & W. 337; *Smith v. Green*, 3 Wils. 403.

² *Merrill v. Claremont*, 58 N. H. 468. 1 C. P. D. 92; *Sharon v. Mosher*, 17 Barb. 518.

³ *Vandenburgh v. Truax*, 4 Denio, 464. ⁵ *Holmes v. Harrington*, 20 Mo. Ap. 661.

⁴ *Allen v. Truesdell*, 135 Mass. 75,

did in the emergency the most prudent thing.¹ On the other hand —

§ 47. **Illustration limiting Doctrine** — (Not Natural and Probable). — Where a telegraphic message asking for five hundred dollars was in the transmission carelessly altered to read five thousand, and the person receiving it remitted the larger sum to the sender of the message who embezzled it, the court refused to hold the telegraphing company responsible; because embezzlement was not the natural or probable consequence of the mistake.²

§ 48. **The Three Propositions — Reasons.** — The foregoing three propositions are believed to comprehend the whole doctrine on this subject. In the cases, all sorts of argumentation and minor views appear; and still these three propositions will be found to contain the fundamental substance and reason of all.

V. *Consent or Waiver.*

§ 49. **The Doctrine** — of this sub-title is expressed in the familiar maxim, *Volenti non fit injuria*, that to which a person consents is not in law deemed an injury.³ For example, —

§ 50. **Entry on Land.** — If one invites or permits another to come upon his land,⁴ or gives a village leave to discharge its sewage thereon,⁵ or by not objecting suffers another to come into his house,⁶ he cannot complain of the act as a trespass. So —

§ 51. **Seduction.** — A husband cannot rely upon that, as a

¹ *Lowery v. Manhattan Ry.* 99 N. Y. 153. And see *Aldrich v. Gorham*, 77 Maine, 287; *McDonald v. Snelling*, 14 Allen, 290; *Alabama Great Southern Rld. v. Chapman*, 80 Ala. 615; *Adams v. Young*, 44 Ohio State, 80.

² *Lowery v. Western Union Tel.* 60 N. Y. 198. And see *Reiper v. Nichols*, 31 Hun, 491; *Hoag v. Lake Shore, &c. Rld.* 4 Norris, Pa. 293; *Pennsylvania Rld. v. Hope*, 30 Smith, Pa.

373; *Seale v. Gulf, &c. Ry.* 65 Texas, 274.

³ *Broom Leg. Max.* 2d ed. 201.

⁴ *Owens v. Lewis*, 46 Ind. 488; *Sweetser v. Boston, &c. Rld.* 66 Maine, 583; *Dingley v. Buffum*, 57 Maine, 379; *Wheeler v. Meshinggomessia*, 30 Ind. 402.

⁵ *Searing v. Saratoga Springs*, 39 Hun, 307.

⁶ *Cutler v. Smith*, 57 Ill. 252.

seduction of his wife, to which he has either expressly or impliedly consented.¹ Likewise —

§ 52. **Deceit.** — A thing done by one under a fair agreement with another cannot be the foundation of an action of deceit by the latter.²

§ 53. **This Doctrine** — is in form multitudinous, and it extends through the entire law.³ Waiver is simply a particular sort of consent. We shall see illustrations of the doctrine in every part of this volume.

VI. *The Merits or Dèmerits of the Party Complaining.*

§ 54. **Axioms.** — Instead of searching under this head for a Latin maxim, let us look among the axioms of juridical reason. Since the business of the courts is to enforce obedience to the law, they cannot lawfully assist a suitor in any effort to break it. At the same time, a man's being a sinner, whether against the divine law or the human, does not authorize another sinner to maltreat him. So that, in an action of tort, a bad man stands on the same footing as a good one; but neither can have judicial assistance in breaking the law, or compensation for having broken it, or a refund of what he has expended in its breach. Thus, —

§ 55. **Indemnity or Pay for Wrong.** — One who commits either a civil trespass or a crime, knowing it to be such, can recover neither a promised indemnity nor pay from a third person.⁴ But a doer not aware of the unlawfulness, — being, therefore, personally without fault,⁵ — may recover.⁶ So, —

§ 56. **Contribution between Joint Wrong-doers.** — If two or more persons combine to do any illegal thing, knowing it to be such, neither can maintain a suit against the other to enforce contribution for what he has been required to pay,⁷ or

¹ Wyndham v. Wycombe, 4 Esp. 16 ;
Rea v. Tucker, 51 Ill. 110.

² Peacock v. Terry, 9 Ga. 137.

³ 1 Bishop Crim. Law, § 255-263,
995-998 ; 1 Bishop Crim. Proceed. § 117-
126 ; Bishop Con. § 777, 789-808, 1299.

⁴ Cumpston v. Lambert, 18 Ohio, 81.

⁵ Bishop Con. § 481-484.

⁶ Stone v. Hooker, 9 Cow. 154 ;
Coventry v. Barton, 17 Johns. 142.

⁷ Herr v. Barber, 2 Mackey, 545 ;
Miller v. Fenton, 11 Paige, 18 ; Camp-
bell v. Phelps, 1 Pick. 62, 65 ; Vose v.
Grant, 15 Mass. 505, 521 ; Peck v. Ellis,

to establish any other like equity.¹ But where the violation of law was not intentional, contribution may be compelled.² Within which principle, a master who, not being personally in fault, had to pay for the negligence of a servant in his absence, may recover the proper proportion against one who was jointly liable with him.³ In like manner, —

§ 57. *Seduction.* — A woman who immorally yields to her seducer cannot have her suit against him for the damages suffered; because, however her will was overcome by his allurements, she finally participated with him in the wrong whereof she complains.⁴ But her father, if he was innocent, and she was his servant, can maintain the suit;⁵ yet not if he connived at the wrong.⁶ For example, one is without redress who permits a man known by him to be married to visit his daughter as her suitor, though such suitor seduces her.⁷ On a like principle, —

§ 58. *Immoral Book pirated.* — There can be no valid copyright of a book libellously immoral, for the law will not protect one in violating law. And the author of such book can maintain no action against a publisher who has pirated it; since, besides the plaintiff's having no copyright, his claim is founded as well on his own violation of law as on the defendant's, and he simply asks the court to assist him in an enterprise of law-breaking.⁸

§ 59. *Limits of Doctrine.* — The limits of this sort of doctrine are, upon the authorities, a little shadowy, and at places

2 Johns. Ch. 131; *Moore v. Appleton*, 26 Ala. 633; *Minnis v. Johnson*, 1 Duv. 171; *Acheson v. Miller*, 18 Ohio, 1; *Rhea v. White*, 3 Head, 121; *Anderson v. Saylor*, 3 Head, 551; *Merryweather v. Nixan*, 8 T. R. 186.

¹ *Mitchell v. Cockburne*, 2 H. Bl. 379; *Peacock v. Terry*, 9 Ga. 137; *Mills v. Western Bank*, 10 Cush. 22.

² *Thweatt v. Jones*, 1 Rand. 328; *Pearson v. Skelton*, 1 M. & W. 504.

³ *Wooley v. Batte*, 2 Car. & P. 417.

⁴ *Paul v. Frazier*, 3 Mass. 71; *Thompson v. Young*, 51 Ind. 599; *Cline v. Templeton*, 78 Ky. 550; *Hamilton v. Lomax*, 26 Barb. 615. There

are States in which this rule has been changed by statute. *Wilson v. Shepler*, 86 Ind. 275; *West v. Druff*, 55 Iowa, 335; post, § 386.

⁵ Post, § 378-384; *Lawrence v. Spence*, 99 N. Y. 669; *Felt v. Amidon*, 43 Wis. 467; *Lunt v. Philbrick*, 59 N. H. 59; *Pence v. Dozier*, 7 Bush, 133; *Hudkins v. Haskins*, 22 W. Va. 645; *Bennett v. Allcott*, 2 T. R. 166.

⁶ Post, § 379.

⁷ *Reddie v. Scoolt*, Peake, 240.

⁸ *Stockdale v. Onwhyn*, 5 B. & C. 173, 2 Car. & P. 163; *Lawrence v. Smith*, Jacob, 471.

the decisions are in discord. In just legal principle the true view is believed to be, that, where one is seeking the help of the court in doing a wrongful thing, or compensation for having done it, or redress for another's having participated with him in it, or where in any other manner compliance with his prayer would involve an affirmance of his wrong as though it were a right, his suit will be rejected. For should the court grant what he asks, it would thereby in effect join with him in breaking the law it was established to maintain.¹ But where the defendant's wrong, however it may seem to lie in juxtaposition to the plaintiff's, exists separate from it, the action is maintainable.² There are cases under the facts whereof this distinction may be a little obscure, but in the nature of the question it is believed not to admit of a plainer one. Thus, —

§ 60. **Plaintiff's Trespass combining with Defendant's Wrong.** — If, without invitation or enticement but purely in trespass, one puts himself upon the land or into the vehicle of another, and is there injured through some mere negligence of the latter, so that the injury flows from a coalescing of the two wrongs, and not from the disconnected action of the party trespassed upon, there can be no recovery; the plaintiff being a participant with the defendant in the combination of things of the result whereof he complains.³ For example, if an owner of private lands leaves unguarded a dangerous place, and a trespasser is harmed by contact with it,⁴ or if the negligent running of a railroad train injures one who is upon it without right,⁵ the party suffering can recover nothing of the other. And there are multitudes of other cases within this principle.⁶ But, —

§ 61. **Disconnected Wrong of Defendant.** — Though one may

¹ Ante, § 54.

² Stallings v. Owens, 51 Ill. 92.

³ 2 Bishop Mar. & Div. § 75.

⁴ Hargreaves v. Deacon, 25 Mich. 1; Lary v. Cleveland, &c. Rld. 78 Ind. 323; Gillespie v. McGowan, 4 Out. Pa. 144; post, § 845.

⁵ Way v. Chicago, &c. Ry. 64 Iowa,

48; Toledo, &c. Ry. v. Beggs, 85 Ill. 80; post, § 1094.

⁶ Baltimore, &c. Rld. v. Schwindling, 5 Out. Pa. 258; Carter v. Columbia, &c. Rld. 19 S. C. 20; Everhart v. Terre Haute, &c. Rld. 78 Ind. 292; Matze v. New York Cent. &c. Rld. 3 Thomp. & C. 513, 1 Hun, 417.

have wrongfully put himself upon the premises or in the power of another, he has not thereby made himself as to the other an outlaw; and if the latter injures him by some disconnected wrongful act, or by the disconnected omission of a duty which even in these circumstances lies upon him, the former may maintain his suit therefor.¹ For example, the removing of a trespasser from a railway locomotive is a distinct thing from the running of it, and is not a mere negligence; therefore if, while the locomotive is going at a dangerous speed, he is ejected from it and is run over, he may have his action.² And within this doctrine may be gross negligence in the running of cars.³ We now come to a class of cases of considerable difficulty. Thus, —

§ 62. *Injury while violating Public Law — (Rebellion — Lord's Day).* — During our Secession War, a Confederate officer took cars to report to his superior, and was injured through the negligence of the road. If before peace the case had been heard by a Confederate court, the complaining officer would have been *rectus in curia*. But the suit was brought after the suppression of the rebellion, and the reconstructed tribunal held that, the plaintiff and defendant being jointly violating the law when the accident occurred, there could be no recovery. "In the view of the courts of the present government," said Reade, J. "the service in which the plaintiff was engaged was illegal. The act of going to the field of operations was illegal, and the contract of the defendant to aid him by carrying him to the field was an illegal contract; and, upon the supposition that both parties were rebels, — the most favorable one for the plaintiff, — there can be no recovery."⁴ Treason and Sabbath-breaking, the former being the highest offence known to the law, and the latter a violation of statutes often only penal, are in some particulars quite differently treated in our jurisprudence. But, as to the question before us, they

¹ *Illinois, &c. Rld. v. Godfrey*, 71 Ill. 500; *Bullard v. Mulligan*, 69 Iowa, 416.

² *Carter v. Louisville, &c. Ry.* 98 Ind. 552.

³ *Toledo, &c. Ry. v. Beggs*, 85 Ill. 80; *Keyser v. Chicago, &c. Ry.* 56 Mich. 559.

⁴ *Turner v. North Carolina Rld.* 63 N. C. 522, 525, 526.

are believed not to be distinguishable. And we have judicial authority which, in accord with the case just stated, holds that a person travelling on the Lord's day contrary to a statute cannot recover of the party carrying him, for an injury suffered through the latter's negligence.¹ On this same line of reasoning it has been further held that one unlawfully travelling on the Lord's day, whether in another's vehicle or his own, and receiving harm from a defect in the road, can recover nothing of the corporation that should keep it in repair.² And the courts which sustain this doctrine apply it also to analogous cases.³

§ 63. **The Principle** — on which cases of this class proceed is accepted by all, but there is a difference as to its application. If, as the judicial expression sometimes is, the "unlawful act" of the injured party suing "was a contributory cause of the injury,"⁴ no tribunal, it is believed, would, while so regarding it, sustain the action. But in another connection we saw that there is a distinction between the "cause" of a harm and the occasion whereof an independent force avails itself.⁵ And the reader who examines the authorities on the present question will discover that the courts sustaining the doctrine of the last section look upon the violation of law as the cause, not simply as the occasion, of the injury. And plainly, if they are right herein, they are right in the conclusion at which they arrive. On the other side, —

§ 64. **Contrary Authorities.** — Other of our courts, it is believed justly, look upon the violation of law in these cases, — for example, look upon an act of Sabbath-breaking, or of travelling to promote treason, — like the gust of wind spoken of at a preceding place,⁶ as the mere occasion, the opportunity,

¹ *Bucher v. Fitchburg Rld.* 131 Mass. 156.

² *Cratty v. Bangor*, 57 Maine, 423; *Jones v. Andover*, 10 Allen, 18; *Bosworth v. Swansey*, 10 Met. 363; *Johnson v. Irasburgh*, 47 Vt. 28; *Holcomb v. Danby*, 51 Vt. 428.

³ *Smith v. Boston, &c. Rld.* 120 Mass. 490; *Wallace v. Merrimack River,*

&c. Co. 134 Mass. 95; *Day v. Highland Street Ry.* 135 Mass. 118; *Read v. Boston, &c. Rld.* 140 Mass. 199. Since these Massachusetts cases were decided a statute has altered the rule.

⁴ *White v. Lang*, 128 Mass. 598, 599.

⁵ *Ante*, § 42.

⁶ *Ante*, § 43.

the bringing of the parties and forces together, by reason whereof the act or neglect of the wrong-doer found itself in proximity to the person or thing injured. In another form of the expression, the plaintiff's violation of the law is not, in these circumstances, a necessary part of the case on which he relies for a recovery ;¹ but, when he put himself on board the cars, and was accepted as a passenger, so that he was not a trespasser,² the defendant's duty arose to carry him safely ;³ or, when he took to the highway in either a public or private travelling, the duty of the corporation to keep it in repair for the use of travellers was not suspended by the fact of the time being Sunday ; therefore the right of recovery is in no way affected by the plaintiff's collateral wickedness. Such is the result of the authorities on this reverse side of the question, though the reasoning may not be in all of them quite so.⁴ Even in a State wherein the doctrine of the section before the last is adhered to, it has been held that one of two persons engaged in trotting their horses for money contrary to a statute may maintain an action against the other for wilfully running him down,⁵ and that one unlawfully travelling on Sunday may recover for injuries inflicted by a dog for whose doings the defendant is responsible.⁶ In these cases, the court looked upon the wrong of the defendant as disconnected from that of the plaintiff. In principle, is not the wrong of a town in neglecting to repair one of its highways, quite as distinctly disconnected from the wrong of a person who selects Sunday for a journey upon it, which he ought to postpone till Monday ?

¹ *Fivaz v. Nicholls*, 2 C. B. 501, 512 ; *Simpson v. Bloss*, 7 Taunt. 246.

² Ante, § 60.

³ "The right which a passenger by railway has to be carried safely does not depend on his having made a contract, but the fact of his being a passenger casts a duty on the company to carry him safely." Blackburn, J., in *Austin v. Great Western Ry.* Law Rep. 2 Q. B. 442, 445, 446, referring to *Marshall v. York, &c. Ry.* 11 C. B. 655.

⁴ *Platz v. Cohoes*, 89 N. Y. 219, 24 Hun, 101 ; *Carroll v. Staten Island Rld.* 58 N. Y. 126 ; *Piollet v. Simmers*, 10 Ont. Pa. 95 ; *Frost v. Plumb*, 40 Conn. 111 ; *Knowlton v. Milwaukee City Ry.* 59 Wis. 278 ; *Sewell v. Webster*, 59 N. H. 586 ; *Opsahl v. Judd*, 30 Minn. 126 ; *Louisville, &c. Ry. v. Frawley*, 110 Ind. 18.

⁵ *Welch v. Wesson*, 6 Gray, 505.

⁶ *White v. Lang*, 123 Mass. 598.

§ 65. **Other Questions**, — sufficiently connected with this sub-title to be properly enough considered in it, can be more satisfactorily elucidated at places further on, where they will arise, than here. The foregoing sections bring fully to view the principles of law involved in the entire subject.

VII. *The Limitings of Doctrine by the Procedure of the Courts.*

§ 66. **Defined.** — A right which the law acknowledges, while yet it has no procedure capable of giving it practical effect, is equivalent to no right. Thus, —

§ 67. **Extraterritorial.** — By a principle of private international law, our courts recognize and enforce rights acquired abroad when not inharmonious with our own law.¹ But it may happen that, for giving effect to a right of this sort, we have no adequate procedure. Thereupon it becomes practically null.² Again, —

§ 68. **Among Ourselves — (Trespass to Land).** — Our domestic rights are more or less modified or restrained by unyielding judicial forms. For example, an action to recover damages is the remedy given by the common law for a trespass to lands. Thereupon, if a man who can be made to pay no damages commits such trespass, the owner has practically no common-law remedy. And ordinarily, for this sort of wrong there is no remedy in equity.³ Still, in cases of repeated and continuous trespasses by insolvent persons, equity will interfere by injunction.⁴ And there are various other circumstances in which the injunction will be awarded in restraint of a threatened or impending trespass, but often an injured party is practically without remedy.⁵

¹ *The Halley*, Law Rep. 2 P. C. 193; post, § 1277.

² Bishop Con. § 1403.

³ *Mulvany v. Kennedy*, 2 Casey, Pa. 44; *Thomas v. James*, 32 Ala. 723; *Tevis v. Ellis*, 25 Cal. 515; *Duvall v. Waters*, 1 Bland, 569.

⁴ *Gibbs v. McFadden*, 39 Iowa, 371;

Webb v. Harp, 38 Ga. 641; *Musselman v. Marquis*, 1 Bush, 463.

⁵ *London, &c. Ry. v. Lancashire, &c. Ry.* Law Rep. 4 Eq. 174; *Crompton v. Lea*, Law Rep. 19 Eq. 115; *McBrayer v. Hardin*, 7 Ire. Eq. 1; *More v. Massini*, 32 Cal. 590; *Smith v. Rock*, 59 Vt. 232; *Hillman v. Hurley*, 32 Ky. 626.

§ 69. **Other Illustrations** — might be given; but the principle is unquestionable, and a simple calling of the attention to it suffices for the present chapter.

VIII. *The Tort being also a Crime.*

§ 70. **In another Work**, — the author has so fully explained this subject that little need be added here.¹

§ 71. **The Doctrine** — in general terms is, that the civil wrong and the criminal are legally distinct things, though both may proceed from one act of the offender. If the injury is of a nature falling on the entire community, an individual suffering from it only as others do can maintain no action against the wrong-doer, even should it in degree casually press more heavily upon him than upon others.² But he who suffers a special damage may have his suit, though by reason of the public harm the defendant is also indictable.³

IX. *The Tort being also a Breach of Contract.*

§ 72. **Blending.** — There is, in the legal field, a not well defined space within which tort and contract mingle, or blend, or overlies each other, in ways partly plain and familiar, and partly obscure. Something of this is explained in the author's "Contracts."⁴ Leaving out of view here such questions as the waiving of a tort and suing on a contract which the law creates,⁵ —

¹ 1 Bishop Crim. Law, § 264-278.

² Compare *Wilder v. De Cou*, 26 Minn. 10; *Willard v. Cambridge*, 3 Allen, 574; *Allen v. Freeholders*, 2 Beasley, 68; *Platte, &c. Ditch Co. v. Anderson*, 8 Colo. 131; *Powell v. Bunger*, 91 Ind. 64; *Beaudan v. Cape Girardeau*, 71 Mo. 392; *Pittsburgh, &c. Rld. v. Jones*, 1 Am. Pa. 204.

³ *Garitee v. Baltimore*, 53 Md. 422; *Egbert v. Greenwalt*, 44 Mich. 245; *Wilder v. De Cou*, supra; *Benjamin v. Storr*, Law Rep. 9 C. P. 400; *Shirley v. Bishop*, 67 Cal. 543; *Brakken v.*

Minneapolis, &c. Ry. 29 Minn. 41; *Mahady v. Bushwick Rld.* 91 N. Y. 143; *Gifford v. McArthur*, 55 Mich. 535; *Larson v. Furlong*, 63 Wis. 323; *Potter v. Menasha*, 30 Wis. 492; *Grisby v. Clear Lake Water Co.* 40 Cal. 396; *School District v. Neil*, 36 Kan. 617.

⁴ *Bishop Con.* § 183-187, 216, 228.

⁵ *Ib.* § 186, 782; *Mississippi Cent. Rld. v. Fort*, 44 Missis. 423; *Walker v. Davis*, 1 Gray, 506, 509; *Cummings v. Noyes*, 10 Mass. 433, 435, 436; *Lightly v. Clouston*, 1 Taunt. 112, 114; *Foster v. Stewart*, 3 M. & S. 191.

§ 73. **Doctrine defined.**—The doctrine of this sub-title is that, though a tort is a breach of a duty which the law¹ in distinction from a mere contract has imposed,² yet the imposing of it may have been because of a contract, or because of it and something else combining, when otherwise it would not have created the duty.³ In such a case commonly, not descending now into minute distinctions, the party injured by the non-fulfilment of the duty may proceed against the other for its breach or for the breach of the contract, at his election.⁴ Thus,—

§ 74. **Carrier.**—Because a common carrier, whether of goods or passengers, is a sort of public servant, the law imposes its duties upon him, a breach whereof is a tort, though there is also a contract which is violated by the same act.⁵ And—

§ 75. **Other Bailments — Public Employment.**—The same doctrine extends also to the other sorts of bailment.⁶ And, more broadly, “where there is a public employment from which arises a common-law duty, an action may be brought in tort, although the breach of duty assigned is the doing or not doing of something contrary to an agreement made in the course of such employment, by the party on whom such general duty is imposed.”⁷ Now,—

¹ *Riddle v. Proprietors of Locks*, 7 Mass. 169.

² *Ante*, § 4.

³ *Langridge v. Levy*, 2 M. & W. 519; *Collis v. Selden*, Law Rep. 3 C. P. 495, 497; *Blakemore v. Bristol, &c. Ry.* 8 Ellis & B. 1035; *Winterbottom v. Wright*, 10 M. & W. 109; *Clifford v. Denver, &c. Rld.* 9 Colo. 333.

⁴ *Stimpson v. Sprague*, 6 Greenl. 470; *Church v. Mumford*, 11 Johns. 479; *Boorman v. Brown*, 3 Q. B. 511, 11 Cl. & F. 1; *Bank of Orange v. Brown*, 3 Wend. 158; *Stoyel v. Westcott*, 2 Day, 418, 422; *Vasse v. Smith*, 6 Cranch, 226; *Rawson v. Dole*, 2 Johns. 454; *Illinois Cent. Rld. v. Phelps*, 4 Bradw. 238; *Govett v. Radnidge*, 3 East, 62; *Burnett v. Lynch*, 5 B. & C. 589, 604.

⁵ *Clark v. St. Louis, &c. Ry.* 64 Mo. 440; *Hammond v. Northeastern Rld.* 6 S. C. 130; *Southern Express v. McVeigh*, 20 Grat. 264; *Tattan v. Great Western Ry.* 2 Ellis & E. 844; *Pozzi v. Shipton*, 8 A. & E. 963; *Collett v. London, &c. Ry.* 16 Q. B. 984; *Baltimore City Pass. Ry. v. Kemp*, 61 Md. 619; *Ross v. Hill*, 2 C. B. 877; *Nicholls v. More*, 1 Sid. 36; *Rich v. Kneeland*, Hob. 17, Cro. Jac. 330; *Coggs v. Bernard*, 2 Ld. Raym. 909, 1 Salk. 26, 3 Salk. 11, 268.

⁶ *Ferrier v. Wood*, 4 Eng. 85; *Stan- yon v. Davis*, 6 Mod. 223, 225, Holt, 13.

⁷ *Southern Express v. McVeigh*, 20 Grat. 264, 284, by Anderson, J.; *Bona- fous v. Walker*, 2 T. R. 126; *Rawson v. Dole*, 2 Johns. 454.

§ 76. **Limit — (Contract).** — The doctrine is not, that the breach of any contract may at the election of the party injured be treated as a tort, but it is applicable only where the law casts its separate obligation.¹ Yet, consistently with this proposition, a man may be answerable for a tort in negligently or unskilfully performing a duty which would have no existence but for a contract, to the injury of the other party; in which case, it is immaterial whether there was a consideration for the contract or not.² And if one drives a hired horse further than agreed, or in a different direction, he commits thereby the tort of a conversion, and becomes liable for any injury it may suffer or for its death;³ the case being governed, it is perceived, partly by the contract and partly by the independent law. We have another illustration in a —

§ 77. **Deceitful Warranty.** — If a vendor, by fraud practised on a vendee, has sold what he at the same time warranted, — a case of simultaneous contract and tort, — the vendee may have his remedy either upon the practised deceit or upon the warranty, as he chooses.⁴

§ 78. **Other Illustrations** — will be more serviceable, in appropriate places, further on.

§ 79. *The Doctrine of this Chapter restated.*

Every part of the law, including the subject of this volume, consists of principles limited by other principles. The limiting ones of this chapter are the chief of those which pertain to tort, but we shall discover some others as we proceed. If

¹ *Courtenay v. Earle*, 10 C. B. 73, 15 Jur. 15.

² *Gill v. Middleton*, 105 Mass. 477; *Seare v. Prentice*, 8 East, 348; *Norris v. Staps*, Hob. 210 b; *Rex v. Kilderby*, 1 Saund. 311, 313. As bearing on the question of the needlessness of the consideration, it should be kept in mind that here the contract is executed, though imperfectly, and that a consideration is not essential to an executed contract. *Bishop Con.* § 81, 82.

³ *Post*, § 405; *Wheelock v. Wheel-*

wright, 5 Mass. 104; *Lucas v. Trumbull*, 15 Gray, 306; *Homer v. Thwing*, 3 Pick. 492; *Woodman v. Hubbard*, 5 Fost. N. H. 67; *Fish v. Ferris*, 5 Duer, 49; *Disbrow v. Tenbroeck*, 4 E. D. Smith, 397.

⁴ *Randall v. Raper*, Ellis, B. & E. 84; *Mullett v. Mason*, Law Rep. 1 C P. 559; *Pasley v. Freeman*, 3 T. R. 51; *Langridge v. Levy*, 2 M. & W. 519; *West v. Emery*, 17 Vt. 583; *Johnson v. McDaniel*, 15 Ark. 109.

one has done a wrongful act, and the public has suffered, the State may treat it as a crime; but, whether it does so or not, no other individual can complain unless he, in a manner differing from the entire community, has suffered. And the wrong and injury must not be separate things, they must exist in combination; must be of a magnitude justifying the law's interference; must constitute cause and effect; and the wrong must be adequately proximate to the injury. One cannot complain if the thing done was with his consent; or, if he was also a wrong-doer in such a way as to render his wrong a part of the case which he presents against the defendant. And, whatever his rights, he cannot enforce them except by a procedure recognized by law; so that, if the law has none which is adequate, his right practically fails. The wrong, to be within the definition of a tort, must be a disturbance of some right which the law, in distinction from a contract, has created; but it is no objection that there is also a contract, either partly or altogether coinciding with the law-created right, or that the wrong consists in doing a contract duty negligently or improperly.

CHAPTER IV.

THE NATURE AND METHODS OF THE PRINCIPLES.

§ 80. **Relations of Subject.** — The non-contract law, to be considered in this volume, unlike the law defining and enforcing the agreements of parties, is in the main a direct product of natural justice. And it is more purely common law, less modified by statutes, than are the rules which govern most other departments of our jurisprudence. So that this volume, in this introductory part of it, is a particularly appropriate place wherein to take a brief view of the nature and methods of legal principles.

§ 81. **Not Arbitrary Rule.** — That the common law is not a set of arbitrary rules, but, on the other hand, that it is the offspring of fundamental right, that it is not the mere unreasoning command of a lawgiver, but is itself reason, is a proposition sufficiently derivable from what is set down in the foregoing chapters. Let us further see what and whence it is.

§ 82. **Whence.** — Though we contemplate God as the author and source of all things, we do not listen for words directly from his lips, as though he were a man speaking to us. His annunciations are through his works. The nature and conscience of man utter the human laws, as the harmoniously rolling spheres do the laws of their existence. To learn these human laws, therefore, we look to man in his manifestations from age to age, to his inner consciousness, and to his outward expressions. And from these sources, whereof our own judgment and reason constitute a part, we derive our conclusions both as to what is right and what is law. Now, —

§ 83. **Formation of our Law.** — As vegetation springs from the earth under the influences of the rain, of the sunshine,

and of the seasons, so do opinions come from the human mind through the friction of thought, discussion, and ever-shifting affairs of men. And as the tree and plant know not why they grow, and the different sorts of vegetation are without apprehension of the laws whereby their blendings render the earth beautiful; so do opinions come and pass away, or remain and consolidate into permanent forms, with little idea, in those who entertain them, of the broader laws, the fundamental and eternal right, whereon they rest, and of the substance whereof they are. To these opinions, formed step by step and fact by fact, men dwelling in society conform their actions; and thus usage becomes law. This law, as society advances and is perfected, the tribunals enforce. So that, going back to the beginning, and tracing society downward until civilization has established itself among our ancestors on the British Islands, and thence downward through our colonial existence until the present day in our States, we have the law of this and other legal subjects in the accumulated wisdom of ages, modified and defined by judicial decisions and in a greater or less degree by statutes.

§ 84. **Law as Composed of Principles.** — During the earlier ages, the growths and manifestations which we have learned to trace to the laws of nature seemed but the happenings of chance or the gambols of the gods. In like manner, these municipal laws of ours, these marvellous accumulations of the wisdom of the past, have appeared, and to those who only superficially look at them they still appear, to be chance customs, judicial hap-hazards, and legislative freaks. In truth, God, who reigns in nature by laws which the eye does not see, reigns thus invisibly yet equally in the human mind and in society. Each particular custom, each just decision of a court such as binds it in future causes, each statute embodying what mankind commends as worthy of preservation, is but the outward manifestation of some principle of justice organic in our individual and social being. Men, who discern what is right in a particular instance, or as legislators enact what is right, or as judges pronounce what is right, may fail to see truly the underlying reason, but it just as much

exists as did the laws of gravitation and of the centripetal and centrifugal forces before the human mind discovered them.

§ 85. **Discovering Law.**—The investigator into our jurisprudence, precisely like the student of physical matter and forces, seeks, most of all, to find the laws, however invisible to outward sight, which in real fact govern the movements, the things, the instances, the cases, or however otherwise the idea is expressed, under his inquiry. The combined decisions and statutes are often, for convenience, and without practical misleading, spoken of as the law. Yet, in truth, behind them may lie, invisible except to the illumined understanding, what in more accurate language is termed the law, whereof they are but particular manifestations. The instances proceed from the mind of man, as vegetation does from the earth. Yet the law of the growth of each is a thing quite distinguishable from the growth itself. So the law of the motions of the physical heavens is simply invisible to the unillumined sight; but, since it has become a part of human knowledge, it is contemplated as quite separable from the motions themselves. In our jurisprudence, not in everything have the students of it, in its present state of development, learned to discriminate between the outward manifestations,—that is, the decisions and statutes,—which are thus distinguishable from the law itself, and the real law as thus explained; but they have proceeded in this field of discovery far enough to render their conclusions accepted verities, and to furnish abundant stimulants to future investigations and discoveries. So that it has become the imperative and acknowledged duty of the writer upon our law to look beyond the mere words of the books into the inner nature of his subject, and to set down what is by him seen for the first time equally with what others discerned before.

§ 86. **The Two Processes.**—Legal investigations, therefore, proceed in the main upon one or both of two processes. The one process consists of looking into the outward manifestations—that is, into the statutes, and more particularly into the decisions—and formulating to the mind the invisible law

whence they proceeded. This may be termed learning the law. The other process consists of applying the law; that is, of bringing the law which has thus been learned into conjunction with the numerous facts in litigation, and determining the legal rights and duties consequent thereon. Now, —

§ 87. **Legal Principles.** — This invisible law, thus ascertained, consists of rules familiarly spoken of as legal principles. They are learned in the main by the first of the two processes just described. One who has simply learned them, however accurately and well, has not become a competent practitioner in the law. He must add thereto the acquired capacity to apply the principles to the ever-changing facts in life. And the latter is quite as difficult to learn as the former. Thus we are brought to —

§ 88. **Reason.** — The legal principles are particular embodiments of reason. So that the law itself is commonly and properly denominated a system of reason. In other words, a legal principle is a formula of reason. It may be a self-evident proposition, in which case it is no less one of reason, or it may be a proposition which reason has wrought out by one or more of its processes. Reason, therefore, can discern whether or how far one of its principles — a legal principle — is to be applied to a particular state of facts; or whether two or more of its principles are to be applied in conjunction, and what is the effect of thus conjoining them, or how far, in special and changing circumstances, the principles must respectively give place to one another. The use of reason, whether in the law or anything else, is acquired less from precept than from practice. It is like the use of the hands or the feet; instruction from a teacher may be serviceable, but the great instructor is the practice which begins with infancy and ends only with death. In similar ways a student of the law learns to apply its principles, and by degrees transmutes himself into a competent practitioner. Hence —

§ 89. **How in this Volume.** — The writer will in this volume, as far as space permits, so unfold his subject as to enable the reader to discern both the processes whereby the law is learned, and those by which it is applied. And it is believed

that in this way the reader will become better enlightened on the subject of this chapter than he would be by a further extension of the chapter itself.

§ 90. *The Doctrine of this Chapter restated.*

One who, with no knowledge of mechanics, looks at a complicated machine doing its work, discovers only results, with little understanding of the methods whereby they are wrought out. And one may even accustom himself to use the machine, as the lawyer does the law, with little more real knowledge of it than is possessed by the uninstructed looker-on. But he who has learned to trace the product of the machine back through its several processes, and has noted how each mechanical principle operates by itself and by its combinings with other principles to produce step by step the manufacture, has alone acquired that knowledge which can render him a perfected master and worker of the machine. It is so likewise in the law. This machine is a device of Wisdom higher than man's. The men who use it have different degrees of understanding of it, but no one has become perfect therein. Of all who in the various ways deal with the law, no one has reached a status superior to that of student. The illustration of the machine explains to us what we need in the law. Remembering that it is a system of principles or, what is the same thing, of reason, we are to learn by constant investigation and notings of results what its principles and reason are, and how to apply them practically to the limitless variety of questions which arise in life.

BOOK II.

MORE MINUTELY OF SOME PARTICULAR PRINCIPLES.

CHAPTER V.

GOVERNMENTAL CONTROL OF PERSON AND PROPERTY.

§ 91. **The Principle** — now to be considered is, that, since the congregating of men in communities is for the common good, and government is a necessity, each individual by implication surrenders to the governing power so much of the control of his affairs as this end requires. And as from the nature of the case the government must be and is the sole judge of what and how much shall be taken from the individual,¹ the practical consequence is that its control over persons and property is supreme. Hence the familiar doctrine of the English law that parliament is omnipotent, — a doctrine to which some concede slight exceptions not important to be considered here.² Whether, in applying this doctrine to our legislatures, we concede the like and other exceptions growing out of natural right or not,³ we find, at least, the chief limitations to be in the restraints set down in our written constitutions. So that, —

§ 92. **Doctrine defined.** — The governments of the United States and of the several States within their respective spheres may, in general, prescribe whatever rules they will for the

¹ Bishop Stat. Crimes, § 989.

² 1 Kent Com. 447, 448; Dwar. Stat. 2d ed. 480-484; 1 Bl. Com. 90, 91, 160.

³ Bishop First Book, § 89-91.

conduct of persons and the use of their property, except as the particular legislature is forbidden by the national or State constitution.¹ There are two methods of prescribing these rules; namely, —

§ 93. **Through Common Law.** — Universally, in this country, wherever the common law prevails, there are common-law restrictions and regulations of men's rights to deal with their own. The entire common law of crimes is one illustration of this, and the common-law doctrines of this volume throughout are other illustrations. Added to which, —

§ 94. **Through Statutes and By-laws.** — Statutes and municipal by-laws are continually making new provisions for the government of men and their property. A violation of these provisions may even subject a man to imprisonment or death. And the restriction upon the use of property may be such as greatly to impair or even to annihilate its value.² Still the law is valid unless it violates some constitutional provision, in which case it is void.³

§ 95. **Constitutional Law** — is one of the great divisions of law in this country. It is not for this volume, except where incidentally it and the ordinary expositions of the volume come into contact. And it would be premature to bring into view in this chapter the several provisions of our common and statutory laws regulating the conduct of person and property. Each particular of this sort will best appear in connection with the general unfoldings of our subject.

§ 96. *The Doctrine of this Chapter restated.*

The common law provides such restraints and regulations of the conduct of persons and property as were anciently deemed desirable. In modern times, they are by statutes extended and changed to keep them in accord with progres-

¹ Bishop Stat. Crimes, § 995; Commonwealth v. Alger, 7 Cush. 53, 84, 85; 606; Daniels v. Hilgard, 77 Ill. 640; Brechbill v. Randall, 102 Ind. 528; Mugler v. Kansas, 123 U. S. 623, 665; Mugler v. Snyder, 15 Kan. 143. Fertilizing Co. v. Hyde Park, 97 U. S. 659, 667; Wurts v. Hoagland, 114 U. S. 2 Mugler v. Kansas, 123 U. S. 623. ³ Bishop Written Laws, § 33, 34.

sive views and new wants. The right to make these alterations is in some degree restricted with us by our national and State constitutions. But, in strict law, with possibly a few exceptions, where the constitutions do not interfere the legislature can effectively make whatever changes it will. So that, in spite of our constitutions, our legislative bodies have it in their power to impose upon the people many arbitrary laws, as well as unwise ones, which the courts will have no jurisdiction to correct. The protection against them is in public sentiment and in the ballot; and this has proved fairly effectual in England, where no written constitution, binding Parliament, exists.

CHAPTER VI.

ONE'S RIGHT TO DEAL AS HE WILL WITH HIS OWN PERSON, PROPERTY, AND INTERESTS.

§ 97. **The Principles.** — Returning now from the inquiry as to what the government may do, we are again to consider what it has done. The principles which underlie the subject of this chapter have already been stated.¹ They are severally plain; and the doctrine of this chapter, which is wrought out by a combining of them, is plain in the abstract, yet when applied to complicated affairs it is in some respects indefinite.

§ 98. **Doctrine defined.** — The doctrine is, that every man is permitted to do what he will with his own property, personal volitions, and personal interests, without responsibility to another casually injured thereby, if he has no purpose to do injury to another, if he does not trespass upon another's property or rights, and if he uses due care to avoid the infliction of needless harm.²

§ 99. **Applications of Doctrine.** — Some doctrines of the law, when stated thus in an abstract form and without illustrations, are adequate guides throughout their entire topic. It is not so with our present one. And the reason is, that men stand side by side, their property lies side by side, their affairs mingle, they mingle, the air and the water and human breath carry impalpable things from one to another and to the com-

¹ Ante, § 10, 11, 14, 15.

² "On reviewing the cases, I am of opinion that no man is answerable in damages for the reasonable exercise of a right, when it is accompanied by a cautious regard for the rights of others,

when there is no just ground for the charge of negligence or unskilfulness, and when the act is not done maliciously." Woodworth, J. in *Panton v. Holland*, 17 Johns. 92, 99. And see *Victory v. Baker*, 67 N. Y. 366.

munity; so that there are immense complications, to which the application of an abstract rule is a nice matter, and in some instances even not admitting of a determination except by judicial authority. We shall in this chapter look at such few illustrations of the doctrine as will give it a practical shape in our understandings, further applications of it being postponed until we find them more helpful further on.

§ 100. **Maxim.** — Relating to our present doctrine we have several Latin maxims; the one most frequently quoted is, *Sic utere tuo ut alienum non lædas*, enjoy your own property in a way not to injure another's.¹ This maxim covers the particular part of our doctrine which it is impossible to make practically definite by general words; so that even the maxim itself was pronounced by a learned judge to be "utterly useless" as a legal guide, though "a very good moral precept."² Still most judges have deemed it to be legally helpful,³ and these expositions will proceed on the assumption that it is. Thus, —

§ 101. **Own, not Another's.** — The terms of the maxim and of our doctrine acknowledge no right in one to enjoy what is another's; so that, for example, a trespass to another's lands or goods is not excused by the trespasser's motives, however worthy, or by his believing them to be his own,⁴ or by the mere accidental nature of the act.⁵ An illustration whereof is one's innocent receiving of stolen goods, or of other things to which in law a title could not be given him; if he sells them he becomes liable to the true owner.⁶ On a like principle, one who for some apparently lawful cause procures the arrest of another must answer to him in damages if any formal step

¹ Broom Leg. Max. 2d ed. 274; Rouse v. Martin, 75 Ala. 510, 515; Martin v. Ogden, 41 Ark. 186, 193; Bransom v. Labrot, 81 Ky. 638, 641; Thurston v. Hancock, 12 Mass. 220, 224; Gilmore v. Driscoll, 122 Mass. 199, 204; Sanderson v. Pennsylvania Coal Co. 5 Norris, Pa. 401; Platt v. Johnson, 15 Johns. 218, 218.

² Selden, J. in Auburn, &c. Plank Road v. Douglass, 5 Selden, 444, 446.

³ For example, Rex v. Ward, 4 A. & E. 384, 406.

⁴ Ante, § 13, 30, 31; Mairs v. Manhattan Real Estate Assoc. 89 N. Y. 498.

⁵ Newsom v. Anderson, 2 Ire. 42.

⁶ Hollins v. Fowler, Law Rep. 7 H. L. 757; Hardman v. Booth, 1 H. & C. 803; Delaney v. Wallis, 15 Cox C. C. 525.

by the law made necessary is, however inadvertently, omitted.¹ But, —

§ 102. **As will with Own.** — When the thing is in matter of law the party's own, the rule, not without exceptions, is that he may deal with it as he will.² For example, he may burn it.³ And should his lawful and cautious dealing with it accidentally result in injury to another, he will be without liability.⁴ Or, where there is a distinct legal right to do a thing, there will be no liability however plain it is that injury, not amounting to an impairment of absolute rights, will result to another.⁵ Thus, —

§ 103. **Damnum Absque Injuria.** — It is the absolute right, almost the legal duty, of every person to be in some useful business.⁶ Hence, however much harm one may do another by setting up a business in competition with him, it can furnish no ground for damages.⁷ So, as the ownership of land carries with it the right to build thereon, if the owner erects a structure which will cut off a pleasant view from another's house and reduce its value, the latter can have no redress.⁸ It is the same where a just debt is transferred to another State where payment can be enforced with greater facility and effectiveness,⁹ or where one bank collects the bills of another and presents them for redemption in a harassing manner to injure its credit;¹⁰ though, in each of these cases, there was a harm from the exercise of a legal right, the law would furnish no redress. The value of a spring may be much impaired by the cutting down of a tree which gives it shade, yet the owner can have no action against another on whose land the tree stands if he fells it.¹¹ Likewise, if a man shuts the door

¹ *Cody v. Adams*, 7 Gray, 59; *Wentz v. Bernhardt*, 37 La. An. 636. Compare with *Davies v. Jenkins*, 11 M. & W. 745.

² *Victory v. Baker*, 67 N. Y. 366; *Gallagher v. Dodge*, 48 Conn. 387.

³ 1 Bishop Crim. Law, § 514; *Frank v. Dunning*, 38 Wis. 270.

⁴ *Edwards's Case*, 2 Leon. 93.

⁵ Post, § 111, 120.

⁶ *Bishop Con.* § 513-520.

⁷ *Pollock Torts*, 130, 131, referring to *Hil.* 11 Hen. IV. 47, pl. 21; 22 Hen. VI. 14, pl. 23.

⁸ *Butt v. Imperial Gas Co.* Law Rep. 2 Ch. Ap. 158.

⁹ *Uppinghouse v. Mundel*, 103 Ind. 238. And see *Underwood v. Brown*, 106 Mass. 298.

¹⁰ *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505.

¹¹ *Lucas v. Bishop*, 15 Lea, 165.

of his house against the sheriff who comes to take another's goods therein, he commits no legal wrong, since he simply exercises a right.¹ These are illustrations of what our books term, not quite elegantly, *damnum absque injuria*,² defined to be "a wrong done to a man for which the law provides no remedy."³ Still, —

§ 104. **Avoiding Injury — (Negligence).** — Commonly, if there are two ways or times in which a man can so put in use his rights as to make them effectual, he should choose the one which will not harm another, instead of the one which will.⁴ The most familiar of the doctrines within this proposition is that of negligence: most rights can be exercised either carefully, so as to avoid injury to third persons, or negligently to their detriment; therefore he who suffers from another's negligence in doing what is lawful may recover his damages of the other, if not himself in fault, though otherwise if he is.⁵ But, —

§ 105. **Right conflicting with Right.** — In various classes of cases, there is in the nature of one's right no way to exercise it except by impairing a fixed and absolute right of another. For example, if I own a piece of land it is my absolute right to do or put upon it whatever I will, so long as I do not suffer the air or the water to carry outside of my lines anything which may be a nuisance to another. Thereupon if a man trespasses on my land, he, though a wrong-doer, has still

¹ Semayne's Case, 5 Co. 91 a.

² Uppinghouse v. Mundel, supra; Gas-light, &c. Co. v. St. Mary Abbott's, 15 Q. B. D. 1.

³ Bouv. Law Dict.

⁴ Post, § 115, 118; Gas-light, &c. Co. v. St. Mary Abbott's, 15 Q. B. D. 1, 5, 6; Dewey v. Leonard, 14 Minn. 153; Hays v. Miller, 6 Hun, 320; Detroit Daily Post v. McArthur, 16 Mich. 447; Robinson v. Baugh, 31 Mich. 290; Aaron v. Broiles, 64 Texas, 316.

⁵ Post, § 115; Baltimore, &c. Rld. v. Reaney, 42 Md. 117; Chataigne v. Bergeron, 10 La. An. 699; Althorf v. Wolfe, 22 N. Y. 355; Louisville, &c.

Rld. v. Sullivan, 81 Ky. 624; Kentucky Cent. Rld. v. Thomas, 79 Ky. 160; Butterfield v. Forrester, 11 East, 60; Philadelphia, &c. Rld. v. Kerr, 25 Md. 521; Bishop v. Union Rld. 14 R. I. 314; Milne v. Walker, 59 Iowa, 186; Chicago, &c. Rld. v. Lammert, 12 Bradw. 408; Alabama Great Southern Rld. v. Jones, 71 Ala. 487; Chicago, &c. Rld. v. Stumps, 69 Ill. 409; Virtue v. Birde, 2 Lev. 196; Flynn v. San Francisco, &c. Rld. 40 Cal. 14; Rockwood v. Wilson, 11 Cush. 221; Union Ry. &c. Co. v. Kallaher, 114 Ill. 325; George v. Fisk, 32 N. H. 32.

the right to live. Then if, without negligence, but taking the most exact aim, I discharge a leaden bullet, which does not pass beyond my lines, through the heart of the trespasser, doing what all would admit to be my exact right but for his presence, I commit an unquestionable wrong. For my right to use my land in shooting has come into antagonism with his right to live; and, in this instance, his was the superior right, to which mine must yield. This case is plain; but, in many other cases, it is doubtful which of two antagonistic rights is the superior one, and which must yield to it as being the inferior. Some illustrations of this are, —

§ 106. *Illustrations.* — It is the absolute right of the owner of land to dig up the soil, or to grade it, or to carry it off. If another person owns adjoining land, and there is a well on it, the latter has an absolute right in the purity of the water. Now, if the land of the first owner lies by the sea, and he so digs it up as to let in the salt water, which percolates into the well of the second owner, the first has infringed upon the absolute right of the second. Which is the superior of these two rights? The second has been adjudged to be, so that an action will lie for the damage to the well.¹ *A fortiori*, it follows from this case that if a man's land forms a natural embankment protecting other lands from an overflow, he will commit a wrong to their owners if he makes a channel through it and lets in the waters.² Then what is the consequence if a man, to protect his land from the overflow of a river, builds an embankment which increases the overflow on another's land? He had the right to build the embankment, and the other had the right not to be harmed thereby. The judicial decision in this case has been directly opposite to that in the other; namely, that the one may build the embankment for his protection, and the other can have no compensation for his loss.³ So the owner of an enraged bull, a creature less valuable than a human being, can recover nothing of a man who kills it in the necessary defence of himself or

¹ *Mears v. Dole*, 135 Mass. 508. Eq. 115. See *Collins v. Macon*, 69 Ga. See *Cahill v. Eastman*, 18 Minn. 324. 542.

² *Crompton v. Lea*, Law Rep. 19 ³ *Hoard v. Des Moines*, 62 Iowa, 326.

family.¹ We thus see that, assuming all these cases to have been correctly decided, which probably we may, there are two classes; in the one class, a man may lawfully exercise his right to the injury of another's right; in the other, he may not. The difference comes from their differing natures and circumstances. Now,—

§ 107. **By what Rule.**—For these conflicting cases, of which the ones just mentioned are but illustrations, it is believed to be impossible to furnish any more definite rule than is above intimated; namely, that the superior right, in whichever party it is, whether in the person acting or in the one passive, must prevail over the inferior. So that the active party is liable to the other or not, according as his right is the inferior or the superior. To determine which it is in a particular case requires juridical skill and culture.

§ 108. **Common Law compared with Code.**—This matter exemplifies the superiority of our common law over a code, or any system of laws existing in iron rule. The latter must necessarily in many instances work that practical injustice which our common-law system is admirably adapted to avoid.

§ 109. *The Doctrine of this Chapter restated.*

Subject to the duty of abstaining from avoidable injury to others, it is every man's right to manage his own volitions, interests, and property as he will, without liability to one casually harmed thereby. In mere method, when the facts of a case permit a choice, he must adopt the course which will not impair another's rights, to the exclusion of one which will. Where there can be no such election, and so right antagonizes right, the inferior must yield to the superior; the party having the superior right, whether he is the active or the passive one, being protected by the law, while the other is not. But no person may so exercise a right as to injure another's legally-recognized right, if there is a way practically open to him whereby he can avoid it, and at the same time make his own right effectual.

¹ Russell v. Barrow, 7 Port. 106.

CHAPTER VII.

DOING WHAT THE LAW PERMITS OR REQUIRES.

§ 110. **In Reason**. — when the law requires or simply permits a thing, it by implication extends its protection to the doer. And such protection necessarily involves a refusal of redress to any other person thereby casually injured. Hence —

§ 111. **Doctrine defined**. — The doctrine of this chapter is, that, whenever one by command or authorization of the law does a thing from which another sustains an injury, he is without liability to the other, who must endure uncompensated what thus befalls him.¹

§ 112. **Sort of Law** — (**Common Law** — **Statute** — **Municipal By-law**). — It is immaterial to this doctrine what sort of law it is which authorizes or commands the doing of the thing. It may be the common law, or a statute, or a municipal by-law; all are equally laws.² But —

§ 113. **Valid**. — A law, to be within this rule, must be

¹ *Barbin v. Police Jury*, 15 La. An. 559; *Radcliff v. Brooklyn*, 4 Comst. 195; *Auburn, &c. Plank Road v. Douglass*, 5 Selden, 444; *Fahn v. Reichart*, 8 Wis. 255; *Bailey v. Devereux*, 1 Vern. 269; *Morris, &c. Rld. v. Newark*, 2 Stock. 352; *Rome v. Omberg*, 28 Ga. 46; *Metropolitan Asylum Dist. v. Hill*, 6 Ap. Cas. 193, 205; *Carhart v. Auburn Gas-light Co.* 22 Barb. 297; *Thomasson v. Agnew*, 24 Missis. 93; *Nashville, &c. Rld. v. Comans*, 45 Ala. 437; *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505; *Titus v. Lewis*, 33 Ohio State, 304; *Merritt v. Fitzgibbons*, 102 N. Y. 362; *Briesen v. Long Island Rld.* 31 Hun, 112; *Miller v. New York*, 109 U. S. 385; *Hamilton v. Vicksburg, &c. Rld.* 119 U. S. 280; *Caledonian Ry. v. Walker*, 7 Ap. Cas. 259, 293; *Koelmel v. New Orleans, &c. Rld.* 27 La. An. 442.

² *Bishop Written Laws*, § 11, 11 a; *Siemers v. Eisen*, 54 Cal. 418; *Wilson v. White*, 71 Ga. 506; *Friday v. Floyd*, 63 Ill. 50; *Jetter v. New York, &c. Rld.* 2 Abb. Ap. 458; *Owings v. Jones*, 9 Md. 108; *Correll v. Burlington, &c. Rld.* 38 Iowa, 120; *Mahan v. Union Depot St. Ry.* 34 Minn. 29; *Baltimore, &c. Rld. v. Mali*, 66 Md. 53; *Rafferty v. Missouri Pac. Ry.* 91 Mo. 33.

valid; that is, if it is a statute it must be constitutional;¹ if a by-law, it must be both constitutional and within the power of the municipality making it, also reasonable and not in conflict with any statute or ordinarily with any essential principle of the common law.²

§ 114. **Whether Exceptions.** — Contrary to the general truth that every particular principle in the law is limited by other principles,³ the doctrine of this chapter, when accurately regarded, appears to be from its nature universal and unqualified. Still, at points all around, it comes in contact with other doctrines which show its extent and true interpretation.⁴ Thus, —

§ 115. **Negligence — Needless Harm.** — Since the law requires men to conduct themselves with care and circumspection, so as to avoid injury to others, its permission or command is never to be interpreted as authorizing negligence. Therefore one who suffers from what another does negligently under license from a statute may have his action against the doer,⁵ and so of any harm which prudence can properly avoid.⁶ And —

§ 116. **Overstepping Permission.** — Any overstepping of a permission given by the law will sustain an action in favor of one who suffers therefrom;⁷ as, for example, though a bawdy-house is licensed under a city ordinance, if the inmates habitually and indecently expose themselves at the windows, the owner of an adjoining dwelling may maintain his suit against the owner who continues to let such house after he has knowledge of this method of occupancy, it not being within the protection of the license.⁸ But, to repeat, —

¹ Bishop Written Laws, § 33, 34.

² Bishop Written Laws, § 17 *a*, 25, 26, 34.

³ Ante, § 79.

⁴ Post, § 295.

⁵ Post, § 436; *Geddis v. Bann Reservoir*, 3 Ap. Cas. 430, 455, 456; *Mersey Docks v. Gibbs*, Law Rep. 1 H. L. 93, 112; *Koelmel v. New Orleans*, &c. Rld. 27 La. An. 442.

⁶ *Biscoe v. Great Eastern Ry. Law*

Rep. 16 Eq. 636; *Gas-light, &c. Co. v. St. Mary Abbott's*, 15 Q. B. D. 1; *Metropolitan Asylum Dist. v. Hill*, 6 Ap. Cas. 193; *Cogswell v. New York*, &c. Rld. 103 N. Y. 10.

⁷ *Parrot v. Cincinnati, &c. Rld.* 10 Ohio State, 624; *Baltimore, &c. Rld. v. Fifth Baptist Church*, 108 U. S. 317, 331; *Dooley v. Kansas*, 82 Mo. 444.

⁸ *Givens v. Van Studdiford*, 86 Mo.

§ 117. **Following Law's Permission.** — So long as the doer keeps strictly within what the law permits, and exercises due care, he is not liable to another injured by his acts. If a statute which gives the permission provides for compensation, he is required to pay it, but nothing more.¹ In the application of this doctrine, not in the doctrine itself, there may be distinctions between —

§ 118. — **Permission Absolute, Discretion, Command.** — It is plain, equally in reason and in law, that, if the law commands a thing in such terms as to leave no discretion, or simply permits the doing in a way which it specifies, he who in the doing simply follows the unambiguous direction is without liability to another person suffering therefrom; while, on the other hand, one given a discretion, where the thing admits of being done in a way not injurious to others, is protected only by adopting such method.²

§ 119. **Private Property for Public Use.** — There is with us a qualification of these doctrines not known in England. The Constitution of the United States forbids the taking of "private property" "for public use without just compensation."³ This restriction does not bind the States;⁴ but the State constitutions have like provisions, some of them further-reaching than this one.⁵ It does not extend to the taxing power, but it is a limitation of the right of eminent domain.⁶ So that, —

§ 120. **Not within Restriction.** — In spite of this constitutional provision, there are innumerable ways in which legisla-

149. See 1 Bishop Crim. Law, § 1090-1096.

¹ *Moyer v. New York Cent. & C. Rld.* 88 N. Y. 351, 356; *Radcliff v. Brooklyn*, 4 Comst. 195; *Briesen v. Long Island Rld.* 31 Hun, 112 (*Baltimore, & C. Rld. v. Fifth Baptist Church*, 108 U. S. 317, dissented from in this case, is not contrary to the text); *Hammersmith, & C. Ry. v. Brand*, Law Rep. 4 H. L. 171, 185; *Cracknell v. Thetford*, Law Rep. 4 C. P. 629; *Miller v. New York*, 109 U. S. 385; *Morris, & C. Rld. v. Newark*, 2 Stock. 352; *New River Co. v. Johnson*, 2 Ellis & E. 435.

² *Sutton v. Clarke*, 6 Taunt. 29; *Baltimore, & C. Rld. v. Fifth Baptist Church*, 108 U. S. 317; *Attorney-General v. Gas-light and Coke Co.* 7 Ch. D. 217; *Metropolitan Asylum Dist. v. Hill*, 6 Ap. Cas. 193; *London, & C. Ry. v. Truman*, 11 Ap. Cas. 45.

³ Const. U. S. amendm. art. 5.

⁴ *Barron v. Baltimore*, 7 Pet. 243; *Withers v. Buckley*, 20 How. U. S. 84.

⁵ *Transportation Co. v. Chicago*, 99 U. S. 635, 642.

⁶ *Gilman v. Sheboygan*, 2 Black, 510; *People v. Brooklyn*, 4 Comst. 419.

tion may authorize one person to do an act injurious to another, for which the latter has no remedy either of restraint or of compensation. For example, if, in the building of streets and bridges, or in the improvement of navigation, an abutter or other person is injured by acts necessary in the prosecution of the work, he has no remedy.¹ Acts of this sort do not constitute the taking of anybody's land.

§ 121. *The Doctrine of this Chapter restated.*

The doctrine of this chapter is, that, whenever the common law, a statute, a municipal by-law, or any other law validly permits or commands one to do a thing, another injured by the doing has no claim against him for compensation. But he must keep strictly within the authority; as, for example, he must not act negligently, since negligent acts are never a necessity, and the law never authorizes them. And if he has a choice of means, he must select those which will not be detrimental to others, because every man should so conduct his own affairs as not needlessly to harm his neighbor. But both in reason and on authority this proposition should not be carried to extremes. In this country, there is a constitutional provision forbidding the uncompensated taking of private property for public use, so that a statute allowing it would be invalid; limiting, therefore, not the common-law doctrine itself, but the scope for its application. In other respects the common law governs these questions.

¹ *Transportation Co. v. Chicago*, 99 U. S. 635; *Rome v. Omberg*, 28 Ga. Comst. 195; *Radcliff v. Brooklyn*, 4 U. S. 280; *Hamilton v. Vicksburg, &c. Rld.*

CHAPTER VIII.

DISCHARGING THE SOCIAL DUTIES.

§ 122. **This Chapter** — is a continuation of the last. It consists of an inquiry into the principles which determine whether or not a particular thing within its title is commanded or permitted by the common law. Whenever it is found to be either, its consequences depend upon the rules stated in the last chapter.

§ 123. **Larger Meaning.** — The term “social duties” is in its larger meaning as broad as the entire law itself. For the function of law consists in regulating the conduct of individuals toward one another and the community; that is, socially, their “social duties.” But we are here employing the term in a narrower sense, yet how much narrower it is needless to say, for it does not affect the doctrine itself, which is that, —

§ 124. **Doctrine of Chapter defined.** — Whenever a thing has become universally recognized to be a social duty, especially when it has become thus elevated into a usage,¹ if of a magnitude and importance sufficient to be within the law’s cognizance,² the doing of it is thereupon either legally required or legally permitted; generally the more important social duties are commanded by the law, the less important are simply permitted. Thus, —

§ 125. **Preserving Human Life.** — Among the most important social duties, recognized by all men, is that of saving one another’s lives when in peril. Therefore the law takes this duty under its protection in such ways as the following. In spite of the rule that a man’s house is his castle, which persons from the outside are not permitted to break open, they

¹ Ante, § 83; Bishop Con. 445.

² Ante, § 35, 36.

may break and enter it and imprison him to prevent his killing therein his wife. This has sometimes been put upon the ground of the duty to prevent the commission of a felony;¹ but, though this is a sufficient reason, if the woman's danger were from a cause not felonious, the law would still permit the doing of an otherwise unlawful act to save her life. "If," said a learned judge, "a house in which a person ill of an infectious disorder lay bedridden took fire, and it was necessary to choose whether the sick person was to be left to perish in the flames or to be carried out through the crowd at the risk or even the certainty of infecting some of them, no one could suppose that those who carried out the sick person could be punishable; and probably a much less degree of necessity might form an excuse."² In the former of these two cases, the otherwise unlawful act was required;³ in the latter, it was simply permitted. Another illustration occurs in the law of negligence. It is not contributory negligence in a party, such as will bar his action for the negligence of the other party, that he risked his life to save life;⁴ as, that he rushed to rescue a child from a railroad track while a train was approaching,⁵ or as engineer on a train stood at his post to preserve the lives of passengers in a collision.⁶ And in various emergencies one is without negligence who imperils his personal safety in the discharge of a duty.⁷

§ 126. **Saving Property.**—It is a universally recognized social duty, though not so high as the last, for people to save one another's imperilled property. This is illustrated in such ways as the following. If one in an emergency preserves

¹ *Handcock v. Baker*, 2 B. & P. 260.

² Lord Blackburn, in *Metropolitan Asylum Dist. v. Hill*, 6 Ap. Cas. 193, 205.

³ Merely not interfering to prevent the commission of a felony is an indictable misdemeanor termed misprision of felony. 1 Bishop Crim. Law, § 717, 718. Though the law is so, it would be practically difficult to find a modern case in which one has been indicted for this offence.

⁴ *Clark v. Famous Shoe, &c. Co.* 16 Mo. Ap. 463; *Donahoe v. Wabash, &c. Ry.* 83 Mo. 560.

⁵ *Eckert v. Long Island Rld.* 43 N. Y. 502.

⁶ *Pennsylvania Co. v. Roney*, 89 Ind. 453.

⁷ *Carroll v. Minnesota Valley Rld.* 14 Minn. 57; *Pigott v. Lilly*, 55 Mich. 150; *Central Rld. v. Crosby*, 74 Ga. 737.

from destruction a stranger's effects, which would otherwise be lost, relying on being compensated for the service, the law will create a promise from the stranger to pay him.¹ Or if, while a conflagration is raging in a city, one in good faith blows up another's house under an evident necessity to stop the spreading of the flames, he is not liable in damages to the owner of the house; the necessities of the occasion, the social duty of preserving the adjacent property and guarding the other public interests, furnish his excuse,² — a doctrine as to the precise limits of which the cases are not in absolute accord.³ Again, —

§ 127. **In Slander.** — There are circumstances in which, by all opinions, it is the social duty of a person inquired of to communicate to the inquirer what he knows regarding the character of another. For example, should one contemplating the hiring of a servant, apply to a former master for his character, the latter may in law, as in social duty he should, tell the applicant what he understands his character to be; and, if the communication is honest and not malicious, no liability to pay damages will result therefrom, though what is said is in fact untrue, is injurious to the servant, and such as would sustain a slander suit under other circumstances.⁴ Now, —

§ 128. **Limits of Doctrine.** — This sort of doctrine runs through the entire law. But it would extend this chapter too far to walk through the entire law with it. We may illustrate its limits by referring again to the title of —

§ 129. **Slander and Libel.** — There are many people who deem it to be the social duty of the editor of a newspaper to state therein whatever news comes to him derogatory to the character of anybody, if apparently well founded, and he believes it; herein placing the newspaper on a different ground from a mere ordinary individual, who has no such obligation

¹ Bishop Con. § 236.

² *Surocco v. Geary*, 3 Cal. 69; *Prerogative Case*, 12 Co. 12, 13; *Bowditch v. Boston*, 101 U. S. 16; *Com. Dig. Trespass, D.*; post, § 163.

³ *Beach v. Trudgain*, 2 Grat. 219; *Hale v. Lawrence*, 3 Zab. 590.

⁴ *Weatherston v. Hawkins*, 1 T. R. 110; *Gardner v. Slade*, 13 Q. B. 796; *Pattison v. Jones*, 8 B. & C. 578; *Dale v. Harris*, 109 Mass. 193; post, § 304.

to the public as a newspaper man is assumed to have. But this view of the functions of a newspaper is not universal, and the supposed duty of a newspaper editor to slander men whenever he can do it honestly has not become an established custom. Therefore this sort of privilege is not recognized by the law.¹

§ 130. *The Doctrine of this Chapter restated.*

The doctrine of this chapter is, that the law recognizes the wider and more important social duties, not including herein many of the minor ones. Therefore it protects people in the honest discharge of those larger duties, even from the consequences of their own mistakes. So that one who casually suffers from another's doing of a duty of this sort is without remedy.

¹ The reader may consult *Commonwealth v. Wright*, 1 Cush. 46, 50, 62; *Hamilton v. Eno*, 81 N. Y. 116; *Foster v. Scripps*, 39 Mich. 376; *Curtis v. Mussey*, 6 Gray, 261; *Mallory v. Pioneer Press*, 34 Minn. 521; *Jones v. Townsend*, 21 Fla. 431; *Bronson v. Bruce*, 59 Mich. 467; *Bradley v. Cramer*, 66 Wis. 297.

CHAPTER IX.

DISOBEYING THE LAW.

§ 131. **Judicial Differences.**—There are slight differences of opinion on some minor questions relating to our present topic. But in the main the doctrine is well settled, conformably to reason, namely, —

§ 132. **Doctrine defined.**—Whenever the common law, a statute, a municipal by-law, or any other law¹ imposes on one a duty, if of a sort affecting the public within the principles of the criminal law,² a breach of it is indictable, and a civil action will lie in favor of any person who has suffered specially therefrom.³ Or, if the matter of the law involves only the interests of individuals, any one who has received harm from another's disobedience may have his suit against him for the damages.⁴ But, if the law as interpreted was not meant to protect the class of persons to which the one suing belongs,⁵ or to protect anybody from the sort of injury complained of, or if in a way held to be exclusive⁶ it provides a different remedy, the action cannot be maintained.⁷

¹ Ante, § 112, 113.

² 1 Bishop Crim. Law, § 237.

³ Ante, § 71; *Payne v. Partridge*, 1 Show. 255.

⁴ 2 Inst. 55, 74, 118; *The Marshalsea Case*, 10 Co. 68 b, 74 b; *Boyden v. Burke*, 14 How. U. S. 575; *Hayes v. Michigan Cent. Rld.* 111 U. S. 228; *Houston, &c. Co. v. Terry*, 42 Texas, 451; *Couch v. Steel*, 3 Ellis & B. 402; *Atkinson v. Newcastle, &c. Co.* Law Rep. 6 Ex. 404; *Bott v. Pratt*, 33 Minn. 323; *Schmidt v. Milwaukee, &c. Ry.* 23 Wis. 186; *Jessen v. Sweigert*,

66 Cal. 182; *Anonymous*, 6 Mod. 27; *Owings v. Jones*, 9 Md. 108; *Savannah, &c. Rld. v. Bonaud*, 58 Ga. 180; *Willy v. Mulledy*, 78 N. Y. 310.

⁵ *East Tennessee, &c. Rld. v. Feathers*, 10 Lea, 103; *Parker v. Barnard*, 135 Mass. 116, 118.

⁶ Not exclusive in *Backenstoe v. Wabash, &c. Ry.* 23 Mo. Ap. 148; post, § 141.

⁷ *Gorris v. Scott*, Law Rep. 9 Ex. 125; *Kirby v. Boylston Market*, 14 Gray, 249; *Flynn v. Canton Co. of Baltimore*, 40 Md. 312; *Heeney v. Sprague*,

§ 133. **The Reason** — of the doctrine is, that remedy is inseparable from law,¹ which cannot exist without it; that each particular remedy must be adapted to its corresponding wrong, being an indictment for a wrong to the public and a civil action for one to an individual; and that still a statute creating a right, or any other statute, may ordain any different remedy which the legislature prefers. To illustrate —

§ 134. **Preventing the Doing.** — If the law confers on one the right to do a thing, another who prevents his doing it disobeys the law, and consequently is liable to a suit for the damages.²

§ 135. **Refusing Copies.** — A statute having made it the duty of the commissioner of patents to furnish copies on application, he is liable to an action if he declines. For, said Grier, J., “where there is a right on the one side, and a corresponding duty imposed on the other, a refusal to perform such duty, on the reasonable request of the party entitled to demand it, will subject the officer to an action.”³

§ 136. **Not building Fence.** — A railroad had the right of way across a public park, under a city ordinance which required it to erect a suitable wall or fence. The company did not obey, and a boy was injured in crossing the track at a place where the fence should have been. It was held liable in damages.⁴ But —

§ 137. **Not clearing Sidewalk** — (*City By-laws*). — We have cases which hold that, under city ordinances requiring land-owners to keep the sidewalks adjoining their estates clear of snow, one suffering through their neglect to obey cannot recover damages of them.⁵ Assuming these decisions to have been right, the just ground for them is that, the legal obligation to keep the ways in repair being on the city, the purpose

11 R. I. 456; *Ward v. Hobbs*, 4 Ap. Cas. 575, 583. And see *Lewis v. Brainerd*, 13; *Stevens v. Jeacocke*, 11 Q. B. 731. 53 Vt. 510.

¹ Bishop Written Laws, § 137.

⁴ *Hayes v. Michigan Cent. Rld.* 111

² Ante, § 31; *Ashby v. White*, 2 Ld. Raym. 938, Holt, 524; *Perring v. Harris*, 2 Moody & R. 5. And see the notes to *Ashby v. White*, in 1 Smith Lead. Cas.

U. S. 228.

³ *Boyden v. Burke*, 14 How. U. S.

⁵ *Kirby v. Boylston Market*, 14 Gray, 249; *Flynn v. Canton Co. of Baltimore*, 40 Md. 312; *Heeney v. Sprague*, 11 R. I. 456; *Taylor v. Lake Shore, &c. Rld.* 45 Mich. 74.

of the ordinance was simply to create a duty from the land-owners to the city, not from them to persons using the ways, though this is not the reason always assigned in the opinion. That in various circumstances disobedience to a city ordinance may be the foundation of an action by a third person suffering therefrom is well settled in law.¹ Thus, in harmony with the case stated in the last section,—

§ 138. **Sign — Awning.** — It has been adjudged that, if a city ordinance forbids the hanging of a sign over a public street, or prohibits awnings unless securely placed and supported, one who puts out a sign contrary to the inhibition and it is blown down by the wind,² or an insecurely supported awning and it falls,³ must make reparation to persons whose property is injured thereby.

§ 139. **Doctrine Broad — Limits.** — It was once judicially observed that “torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief.”⁴ According to which view, and to common observation, there can be no bound to the possible illustrations of the doctrine of this chapter. And these few, only enough to make it distinct, will be as helpful as many would be to the practitioner, who must of necessity examine each question before him in the light of principle. In his applications of the principles, he must keep in mind the qualifications of them derivable from the other doctrines of the law. Thus,—

§ 140. **Viewed as Negligence — Contributory Negligence.** — It suits the argument in many of the cases for the judges to look upon disobedience to a legal command as an act of negligence.⁵ Thereupon the doctrine of contributory negligence

¹ Ante, § 136; *Wilson v. White*, 71 Ga. 506; *Bowyer v. Burlew*, 3 Thomp. & C. 362; *Bott v. Pratt*, 33 Minn. 323; *Jetter v. New York, &c. Rld.* 2 Abb. Ap. 458; *Owings v. Jones*, 9 Md. 108.

² *Salisbury v. Herchenroder*, 106 Mass. 458.

³ *Jessen v. Sweigert*, 66 Cal. 182.

⁴ *Chapman v. Pickersgill*, 2 Wils. 145, 146.

⁵ *Robertson v. Wabash, &c. Ry.* 84 Mo. 119; *Moberly v. Kansas City, &c. Ry.* 17 Mo. Ap. 518; *Madison, &c. Rld. v. Taffe*, 37 Ind. 361; *Siemers v. Eisen*, 54 Cal. 418; *Billings v. Breinig*, 45 Mich. 65; *Correll v. Burlington, &c. Rld.* 38 Iowa, 120; *The Garden City*, 26 Fed. Rep. 766; *Keyser v. Chicago, &c. Ry.* 56 Mich. 559; *Devlin v. Gallagher*, 6 Daly, 494.

applies to the plaintiff, precluding his recovery in cases within its rules.¹ So, also, if the harm complained of did not come from the defendant's disobedience of law, but from something else,—that is, if in the other form of the expression it was not the product of his negligence,—the plaintiff cannot recover though the defendant did at the same time with the injury disobey the law.²

§ 141. *The Doctrine of this Chapter restated.*

One who disobeys the law subjects himself to any proceeding, civil or criminal, which the same law has ordained for the particular case. In the absence of which ordaining, or in the presence of it when not interpreted as excluding other methods,³ he is liable to those steps which the common law has provided for cases of the like class; as, to an indictment, or to a civil action, or to both, according to the nature of the offending. The civil action is maintainable when, and only when, the person complaining is of a class entitled to take advantage of the law, is a sufferer from the disobedience, is not himself a partaker in the wrong of which he complains, or is not otherwise precluded by the principles of the common law from his proper standing in court.

¹ Meek v. Pennsylvania Co. 38 Ohio Mo. 562; Moore v. Chicago, &c. Rld. State, 632; Howenstein v. Pacific Rld. 62 Mo. 584.
55 Mo. 33; The Ebor, 11 P. D. 25; ² Bishop Written Laws, § 134, 137,
Williams v. Chicago, &c. Ry. 64 Wis. 1. 138, 163 e, 250, 250 a, 250 b, 251; Par-
² Holman v. Chicago, &c. Rld. 62 ker v. Barnard, 135 Mass. 116, 120.

CHAPTER X.

WILFULLY INJURING OTHERS.

§ 142. **Wilful distinguished from Accidental.** — There is a wide difference between one's injuring another wilfully, and doing to him a like harm unmeant while discharging a duty or lawfully pursuing an interest.¹ Many unintended injuries are actionable,² but the damages even for these may in some cases be enhanced by showing the wrong to have been wilful.³ Now, —

§ 143. **Doctrine defined.** — “An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent.”⁴ But whenever one inflicts on another a legal injury purposely, and not in the lawful exercise of any right or duty,⁵ he is liable in damages therefor.⁶ To illustrate, —

§ 144. **Threat not to Employ — Preventing unlawful Act.** — No one can, in the absence of contract, require another to employ him: so that to refuse employment is not a legal injury. Therefore, where a person in the habit of hiring men maliciously kept the owner of a house from letting it, by announcing that he would not hire any one who should take it, he inflicted no legal injury on the owner, who therefore could

¹ Ante, § 16.

² Ante, § 101; *Vandenburgh v. Truax*, 4 Denio, 464; *Walton v. Booth*, 34 La. An. 913; *Welch v. Durand*, 36 Conn. 182; *Hansford v. Payne*, 11 Bush, 380; *Underwood v. Hewson*, 1 Stra. 596; *Tally v. Ayres*, 3 Sneed, 677; *Moulton v. Aldrich*, 28 Kan. 300; *Spencer v. Campbell*, 9 Watts & S. 32.

³ *Day v. Woodworth*, 13 How. U. S. 363, 371; *Philadelphia, &c. Rld. v. Quigley*, 21 How. U. S. 202, 213; *Mc-*

Cullough v. Walton, 11 Ala. 492; *Jennings v. Maddox*, 8 B. Monr. 430; *Best v. Allen*, 30 Ill. 30; *Striegel v. Moore*, 55 Iowa, 88; *Lewis v. Bulkley*, 4 Daly, 156; *Elliott v. Van Buren*, 33 Mich. 49; *Drohn v. Brewer*, 77 Ill. 280.

⁴ Parke, B. in *Stevenson v. Newnham*, 13 C. B. 285, 17 Jur. 600, 602.

⁵ Ante, § 110-130.

⁶ *Stevens v. Kelley*, 78 Maine, 445; *Jones v. Jones*, 71 Ill. 562.

not maintain an action against him.¹ So likewise it is not a legal injury to prevent one's doing an unlawful act; and for this, however wilful, no action will lie.²

§ 145. **Malicious Prosecution.** — It is ordinarily lawful, and sometimes commendable, to set in motion against one the processes of the court; but he who, without probable cause, does this from an evil motive — that is, wilfully harms another in this way — is liable to respond in damages.³

§ 146. **Elsewhere — In General.** — In a chapter further on⁴ we shall consider the element of intent in private wrongs. And in other places it will frequently come under our notice incidentally. It need only be added here that the common law regards less favorably the wilful doer of an injury than the accidental one,⁵ and the same principle is not unfrequently carried into legislation.⁶

§ 147. *The Doctrine of this Chapter restated.*

The law in various cases furnishes redress for the injuries which one has received from another unmeant. But the wilful doing of a wrong is more reprehensible than the accidental. There are circumstances which will excuse the unintentional wrong-doer, but none which will excuse the intentional. So that he who purposely does harm to another must respond to him in damages for it, whenever it is of a sort and degree⁷ cognizable by the courts within the general principles of the law.

¹ Heywood v. Tillson, 75 Maine, 225.

² Bangor, &c. Rld. v. Smith, 49 Maine, 9.

³ Post, § 221; Stevens v. Midland Counties Ry. 18 Jur. 932; Wicks v. Fentham, 4 T. R. 247; Farmer v. Darling, 4 Bur. 1971, 1974; Morris v. Scott, 21 Wend. 281; Stone v. Stevens, 12 Conn. 219; Lindsay v. Larned, 17 Mass. 190, 196.

⁴ Post, § 495 et seq.

⁵ Matthews v. Warner, 29 Grat. 570; St. Louis, &c. Ry. v. Wilkerson, 46 Ark. 513; Forney v. Geldmacher, 75

Mo. 113; Topf v. West Shore, &c. Ter. Co. 17 Vroom, 34; Lynch v. McNally, 7 Daly, 126; Campbell v. Stakes, 2 Wend. 137; Tarleton v. McGawley, Peake, 205; Keeble v. Hickeringill, 11 East, 574, note; Munger v. Baker, 1 Thomp. & C. 122.

⁶ Pier v. Hanmore, 86 N. Y. 95; Pier v. George, 86 N. Y. 613; Walker v. Horner, 1 Q. B. D. 4; Claxton v. Lexington, &c. Rld. 13 Bush, 636; Gully v. Smith, 12 Q. B. D. 121.

⁷ Ante, § 16.

CHAPTER XI.

CARELESSLY INJURING OTHERS.

§ 148. **Further on**—There is a chapter on Negligence,¹ considered as a separate title in the law of our subject. The present chapter is necessary to the completion of this preliminary view, but because of the other it may be brief.

§ 149. **Careless compared with Wilful—Accidental.**—The evil mind whence injury flows from one to another may be of any imaginable grade, from the lack of the utmost carefulness, through reckless carelessness, down to the premeditated determination to do the injury. And the doer is more or less reprehensible according to the intensity of the evil which controls him. So that the careless harm of this chapter differs from the wilful of the last only as its position is intermediate between it and the purely accidental. One may be liable for an injury which comes through his carelessness when he would not be if he had been absolutely careful; or he may be excused for the careless infliction when he would not be had it been wilful. Now,—

§ 150. **Doctrine defined.**—The doctrine of this chapter is, that every man should be considerate of the interests of others, and conduct his own affairs and volitions with such carefulness as not needlessly to endanger them; so that, whenever one's want of due care results in a "legal injury"² to another, he is liable in damages therefor, if the injury is of sufficient magnitude,³ and the case is otherwise within the principles which create liability.⁴ Thus,—

¹ Beginning at § 433.

² Ante, § 143.

³ Ante, § 35, 36.

⁴ Post, § 436; *Noyes v. Shepherd*, 30 Maine, 173; *Tally v. Ayres*, 3 Sneed, 677; *Abel v. Delaware, &c. Canal*, 103

§ 151. **Loaded Firearms** — are dangerous if not properly handled. And one is careless who entrusts a loaded gun to a twelve year old child; he should first draw the charge. Therefore if it goes off in the hands of such a child, inflicting harm on another, he must answer for the wrong.¹ And —

§ 152. **Dangerous Pile.** — If one so carelessly builds a wall or pile of timber or other things, where people are in the habit of passing, that it is liable to fall, and it does fall, injuring another, a suit may be maintained against him for the damages.²

§ 153. **Other Illustrations** — might be added, covering the whole field of life. But to proceed so far would be needless, since the principle is the same in the various classes of cases. And though some further expansions of the doctrine, and especially a defining of its limits, are desirable, it is better they should be postponed until we reach the title Negligence.

§ 154. *The Doctrine of this Chapter restated.*

Though activity is a necessity of our earthly being, so that one is not suable for being active even where another is unfortunately injured thereby, yet no one is obliged to put forth his activities carelessly. And he who thus needlessly does it, bringing to another harm which he might avoid, is responsible, if the harm is of the legal sort, and none of the justifications or excuses pertaining to this department of our law come to his relief.

N. Y. 581; Devlin v. Smith, 89 N. Y. 470; Brown v. Hannibal, &c. Rld. 50 Mo. 461, 468; Meredith v. Reed, 26 Ind. 334; Freer v. Cameron, 4 Rich. 228; Collett v. London, &c. Ry. 16 Q. B. 984; Gray v. Pullen, 5 B. & S. 970; Butler v. Milwaukee, &c. Ry. 28 Wis. 487; Taylor v. Holman, 45 Mo. 371; Kahl v. Love, 8 Vroom, 5; Tuel v. Weston, 47 Vt. 634; Pierce v. Whitcomb, 48 Vt. 127; Wagner v. Goldsmith, 78 Ind. 517; Conradt v. Clauve,

93 Ind. 476; Kimball v. Norton, 59 N. H. 1; Murphy v. Orr, 96 N. Y. 14; Chicago, &c. Ry. v. Hughes, 69 Ill. 170; Welch v. McAllister, 15 Mo. Ap. 492; Howe v. Young, 16 Ind. 312.

¹ Dixon v. Bell, 1 Stark. 287. And see Chataigne v. Bergeron, 10 La. An. 699; Cole v. Fisher, 11 Mass. 137, 138.

² Pastene v. Adams, 49 Cal. 87; Maddox v. Cunningham, 68 Ga. 431; Mullen v. St. John, 57 N. Y. 567; Jager v. Adams, 123 Mass. 26.

CHAPTER XII.

NECESSITY AND THE INEVITABLE.

§ 155. Introduction.

156-165. Doctrine of Necessity in General.

166-172. Superior Forces of Nature — Act of God.

173, 174. Superior Human Forces.

175. Interpositions of Law.

176-184. Common Accidents of Life.

185. Doctrine of Chapter restated.

§ 155. **How Chapter divided.** — We shall consider, I. The Doctrine of Necessity in General; II. The Superior Forces of Nature, or Act of God; III. The Superior Human Forces; IV. The Interpositions of Law; V. The Common Accidents of Life.

I. *The Doctrine of Necessity in General.*

§ 156. **Obedience possible.** — A command which cannot be obeyed is not law. Therefore possible obedience is an inseparable element in every law, without which it cannot exist. So that, though a command should be such as could in general be carried out, if in a particular instance it became impossible, it would not be law for that instance. Hence, —

§ 157. **Doctrine defined.** — A necessity which precludes compliance with any law, of whatever sort, constitutional, statutory,¹ or common law, renders the law for the occasion null, and justifies non-compliance.

§ 158. **Maxims.** — Not only are these propositions self-evident, but their early recognition in our legal system is

¹ Bishop Written Laws, § 41, 132.

attested by a series of maxims.¹ The one perhaps most apt is *Lex non cogit ad impossibilia*, the law does not seek to compel things impossible;² or, what is like this in meaning, *Impotentia excusat legem*.³ A maxim less broad is *Actus Dei nemini facit injuriam*, the act of God shall affect no one injuriously.⁴ Other maxims present the idea in varying aspects, but they do not change its substance.

§ 159. **Universal.** — This doctrine, from its nature, cannot be and is not limited to any one branch of the law, it pervades the whole. It is prominent in the criminal law, as to which the author has explained it in other connections.⁵ He has also explained it as to the law of contracts.⁶ But in the latter there is a difference between it and the doctrine now under consideration, rather apparent than real. A party to a contract may validly undertake to pay the damages which the other party suffers from his not doing the thing promised, even where it was the act of God which prevented him.⁷ And always one's promise to do a thing possible to man in his private capacity carries with it the implied warranty of capacity.⁸ But in tort, where the duties which people owe to one another come simply from the law, there is no room for this sort of distinction.

§ 160. **Limits of Doctrine.** — Plain as this doctrine is, when stated in these general terms, its limits are not so palpable. Even the word "necessity" is very elastic in meaning; being sometimes applied to what is highly convenient only, at other times to what is physically unavoidable, while its meaning on other occasions ranges all the way between these extremes. Our common law is a system of practical rules for the government of imperfect beings, and it adapts itself to man as he is, not as he would be if he were infinite in wisdom and power, like the Maker. Hence its excusing necessity is of a practical

¹ A partial collection of them may be found in Abbott Law Dict. *Necessitas*.

² Broom Leg. Max. 2d ed. 181.

³ Broom Leg. Max. ut sup.

⁴ Broom Leg. Max. 2d ed. 171.

⁵ 1 Bishop Crim. Law, § 346-355;

1 Bishop Crim. Proced. § 493-498; and

incidentally 1 Crim. Law, § 53, 54, 824,

842-844; 1 Crim. Proced. § 7, 224 a,

264 b, 264 i, 676; Stat. Crimes, § 124,

125, 132, 137, 238, 755.

⁶ Bishop Con. § 577-609.

⁷ Ib. § 582, 590.

⁸ Ib. § 246, 591, 1416.

sort; in the law of torts it is such as, in the particular circumstances, renders it practically impossible for the particular human being to do otherwise. To illustrate, —

§ 161. **Defence against Public Enemy — War.** — The defence of the country is a supreme necessity. And private rights must, within the usages of war, give way to it. So that, for example, one whose land is entered upon and dug up, or whose property is even destroyed, in such defence, can maintain no action against the defenders.¹ And within this rule, whenever, in war, private property is in good faith and according to the usages of war burned to prevent its falling into the hands of the enemy, the owners cannot have redress.² Now, even this necessity, high as it is, is not of the absolute physical sort; for the warring army might yield and be beaten, and suffer the country to be destroyed. But practically it is absolute, since the life of a nation is an object not less sacred than the life of the law itself. Again, —

§ 162. **Public Way Impassable — (Private).** — Though locomotion is to man an absolute physical necessity, he can breathe and accumulate food without travelling upon a particular road. But when the governing power establishes a public way, it thereby declares that there is a social necessity for its use. The consequence of which is, that when such a way becomes for the occasion founderaus or otherwise impossible to be travelled upon, the traveller may pass over the adjoining lands, doing no avoidable injury, without being liable to the owner as a trespasser.³ We have a *dictum* that this right does not extend to cases wherein, “by the exercise of due care, after notice of obstructions, other ways may be selected and the obstructions avoided.”⁴ We may doubt whether this exception to the right could be applied when it would

¹ Prerogative Case, 12 Co. 12.

² Ford v. Surget, 97 U. S. 594.

³ Campbell v. Race, 7 Cush. 408 (citing, besides the text-books, Henn's Case, W. Jones, 296; 3 Salk. 182; Absor v. French, 2 Show. 28; Young v. —, 1 Ld. Raym. 725; Taylor v. Whitehead, 2 Doug. 745; Bullard v.

Harrison, 4 M. & S. 387, 393; Holmes v. Seely, 19 Wend. 507; Williams v. Safford, 7 Barb. 309; Newkirk v. Sabler, 9 Barb. 652; Morey v. Fitzgerald, 56 Vt. 487.

⁴ Bigelow, J. in Campbell v. Race, supra, at p. 413.

impose a great amount of extra travel ; since the necessity of passing over the particular way, not another, was adjudged by the act of laying it out. But there is no such adjudication in the case of a private way, to which, therefore, this right of passing over adjoining lands does not ordinarily extend.¹ Yet, if the owner of the adjoining lands himself obstructs the private way, he has thereby himself created, as to the owner of the way, the necessity which gives the right to pass over those lands.² Once more, —

§ 163. **Saving Property.** — The social duty of saving property, spoken of in a preceding chapter,³ is sufficient to found a necessity justifying a trespass, even to the extent of destroying a less amount of other property. So that, for example, one may enter upon another's land "to save goods which are in jeopardy of being lost or destroyed by water, fire, or any like danger," even where they belong to a third person.⁴ And a jettison, when necessary, may be made without involving the carrier in liability for the loss.⁵ Under a similar necessity sufficiently extreme, the master of a stranded vessel, acting in good faith, may sell it and the cargo to protect the owners from greater loss.⁶

§ 164. **Avoidable — (Small-pox).** — A step which may be avoided is not a necessity. For example, it is necessary as a duty due to the whole community, to prevent the spread of contagious diseases ; but a particular step to this end may be necessary or not according to the circumstances. "The statute," it was said in a Connecticut case, "has made all reasonable and practicable provision to prevent the spreading of such diseases, consistent with the right of domicil and prop-

¹ Taylor v. Whitehead, 2 Doug. 745 ; Bakeman v. Talbot, 31 N. Y. 366, 372 ; Holmes v. Seely, 19 Wend. 507 ; Bulard v. Harrison, 4 M. & S. 387, 392.

² Kent v. Judkins, 53 Maine, 160 ; Haley v. Colcord, 59 N. H. 7.

³ Ante, § 126.

⁴ Proctor v. Adams, 113 Mass. 376, opinion by Gray, C. J. ; Parker v. Barnard, 135 Mass. 116, 117, Devens, J. adding : "As individuals may thus en-

ter upon the land of another, firemen may do so for the protection of property, officers of the law for similar purposes, and, under proper circumstances, for the arrest of offenders or the execution of criminal process."

⁵ Price v. Hartshorn, 44 N. Y. 94.

⁶ New England Ins. Co. v. The Sarah Ann, 13 Pet. 387 ; Post v. Jones, 19 How. U. S. 150 ; The Amelie, 6 Wal. 18 ; Hayman v. Molton, 5 Esp. 65.

erty ;" therefore one could not lawfully place a family infected with small-pox¹ in an unoccupied dwelling-house of another, without his consent, or authority from the board of health.²

§ 165. **Further** — of the nature and limitations of the general doctrine will appear in the expositions of the subsequent sub-titles.

II. *The Superior Forces of Nature, or Act of God.*

§ 166. **Act of God.** — What comes from the superior forces is commonly in our books termed the "act of God."³ It may be defined to be a manifestation of nature to which man has not contributed and which he cannot overcome ; examples whereof are lightning and the fire it kindles, cold, a tempest.⁴ Now, —

§ 167. **Doctrine defined.** — The interposition of the act of God excuses one from any duty imposed by law.⁵ Thus, —

§ 168. **Stress of Weather.** — A vessel driven into a port by stress of weather, which is an act of God, is not liable to forfeiture as for breach of an embargo, or of a revenue law,⁶ or of a blockade.⁷ So, —

§ 169. **Scaffold — Liberty-pole — Fire.** — If one with due care erects a scaffold for the repair of a house, and an extraordinary wind blows from it a plank which falls on a passer-by in the street, he is not responsible.⁸ And the like rule applies to a liberty-pole, which such wind causes to fall.⁹ Or if, for a needful purpose and with due care, a man lights a fire on his own grounds, and thereupon an impetuous and sudden wind bears it to a neighbor's, where it does damage, he is excused because the injury came from the act of God.¹⁰ Again, —

¹ Ante, § 125.

² Beckwith v. Sturtevant, 42 Conn. 158.

³ Ante, § 158.

⁴ Bishop Con. § 593 ; Forward v. Pittard, 1 T. R. 27, 33 ; Gordon v. Buchanan, 5 Yerg. 71, 82 ; Merritt v. Earle, 29 N. Y. 115.

⁵ Bishop Con. § 595.

⁶ 1 Bishop Crim. Law, § 351.

⁷ The Nuestra Senora de Regla, 17 Wal. 29.

⁸ Hexamer v. Webb, 101 N. Y. 377, a case not absolutely apt to the point in the text, but reasonably so.

⁹ Allegheny v. Zimmerman, 14 Norris, Pa. 287.

¹⁰ Turberville v. Stamp, 1 Comyns, 32, 33.

§ 170. **Railroad Bridge — Track.** — Where a cloud-burst causes a well-built railroad bridge to fall, the company is not liable for consequential damages.¹ And it is the same where a train is overturned through the sudden weakening of the track by a violent storm, if the company and its employees are free from negligence.²

§ 171. **The Illustrations** — of this doctrine are innumerable. We shall here consider only one other, which somewhat differs from the foregoing; namely, —

§ 172. **Attrition and Accretion.** — Where the forces of nature, such as a running stream or the wind or tide-moved ocean, and even where artificial causes,³ gradually and imperceptibly wear away the soil belonging to a man, or make deposits upon it, there is no practical rule but to compel him to suffer the loss of what is thus taken from him, or permit him to enjoy as gain what is thus given him. And so the rule is that the owner loses whatever land is removed by attrition, and gains what is added by accretion.⁴ So that, for example, if two persons own land, the one on the one side and the other on the other side of a running stream, each bounded by the thread of the stream, which by an imperceptible process changes its position, their respective boundaries change therewith.⁵ And the same rule applies in other analogous cases.⁶

¹ *Rodgers v. Central Pacific Rld.* 67 Cal. 607. See *Illinois Cent. Rld. v. Bethel*, 11 Bradw. 17.

² *Ellet v. St. Louis, &c. Ry.* 76 Mo. 518. Compare with *Philadelphia, &c. Rld. v. Anderson*, 13 Norris, Pa. 351; *Gates v. Southern Minnesota Ry.* 28 Minn. 110.

³ *Attorney-General v. Chambers*, 5 Jur. N. S. 745, 4 De G. & J. 55; *Steers v. Brooklyn*, 101 N. Y. 51.

⁴ *Rex v. Yarborough*, 2 Bligh N. S. 147, 1 Dow & C. 178, 3 B. & C. 91; *In re Hull, &c. Ry.* 5 M. & W. 327; *Seebkristo v. East India Co.* 10 Moore

P. C. 140; *Wilson v. Shiveley*, 11 Oregon, 215; *Mussumat Imam Bandi v. Hurgovind Ghose*, 4 Moore Ind. Ap. 403; *Posey v. James*, 7 Lea, 98; *Mulry v. Norton*, 100 N. Y. 424; *Campbell v. Laclede Gas-light Co.* 84 Mo. 352; *Donovan v. New Orleans*, 35 La. An. 461; *Kehr v. Snyder*, 114 Ill. 313; *Linthicum v. Coan*, 64 Md. 439.

⁵ *Niehaus v. Shepherd*, 26 Ohio State, 40.

⁶ *Buse v. Russell*, 86 Mo. 209; *Cadden, &c. Land Co. v. Lippincott*, 16 Vroom, 405; *Bonewits v. Wygant*, 75 Ind. 41.

III. *The Superior Human Forces.*

§ 173. **Act of Public Enemy.** — An individual man can no more contend with the public enemy than with God. And the act of the public enemy stands as an excuse on the same footing with the other.¹ By this expression are meant the ravages or restraints of war, but not of a robber or a mob.² Still, —

§ 174. **Mob.** — Though a mob, for example, is not a public enemy, there are circumstances in which it will excuse delay while its force is in operation. Thus, a common carrier must transport the goods in a reasonable time, and hindrance by a mob may render a time reasonable which otherwise would be unreasonable.³

IV. *The Interpositions of Law.*

§ 175. **The Doctrine** — of this sub-title is the mere truism that, if the law of to-day forbids what it required or permitted yesterday, the doing of it to-day is not to-day commanded or allowed by the law. This is a matter claiming some consideration in the law of contracts;⁴ it is mentioned here simply to give completeness to the present elucidations.

V. *The Common Accidents of Life.*

§ 176. **Are a Necessity.** — Since man is imperfect, and the law is made for him as thus viewed,⁵ it must recognize, the same as our natural reason does, the fact that the affairs of human existence cannot be carried on without accidents; therefore accidents are a necessity. And this form of necessity must be and is as valid an excuse for violating a rule of law as any other. Hence, —

¹ Bishop Con. § 592, 593, 595; Prerogative Case, 12 Co. 12; Dunson v. New York Cent. Rld. 3 Lans. 265; Dale v. Hall, 1 Wils. 281.

² Bishop Con. § 593, 596.

³ Geismer v. Lake Shore, &c. Ry. 102 N. Y. 563. And see Bishop Con. § 482, 596.

⁴ Bishop Con. § 594.

⁵ Ante, § 160.

§ 177. **Doctrine defined.** — One is not entitled to remuneration for any injury which comes to him from another through any of the common accidents of life, not imputable to negligence, or to a violation of law.¹ But —

§ 178. **Unlawful Act.** — A person doing an unlawful act cannot invoke this principle. He must make good the damage which he creates.² For, since no necessity compels the activities of life to extend to law-breaking, one who thus injures another in doing what is not only needless but an evil and a wrong, ought to repair the mischief.³ For a like reason, and within principles laid down in previous chapters, —

§ 179. **Carelessness.** — He who harms another through carelessness, in doing a thing however lawful or necessary, must indemnify him.⁴

§ 180. **Elsewhere.** — The doctrine of this sub-title presents itself in numerous connections throughout the volume. So that illustrations of it will be accumulating as we proceed. Sufficient may be added here to give it a little more form and distinctness. Thus, —

§ 181. **Parting Dogs fighting — Persons fighting.** — It is a

¹ *Wakeman v. Robinson*, 1 Bing. 213, 8 Moore, 63; *Bullock v. Babcock*, 3 Wend. 391; *Viets v. Toledo, &c. Ry.* 55 Mich. 120; *Hoff v. West Jersey Rld.* 16 Vroom, 201; *Nitro-glycerine Case*, 15 Wal. 524; *McGrew v. Stone*, 3 Smith, Pa. 436; *Beckwith v. Shordike*, 4 Bur. 2092; *Ward v. Jefferson*, 24 Wis. 342; *Goodnough v. Oshkosh*, 24 Wis. 549; *Anthony v. Louisville, &c. Ry.* 27 Fed. Rep. 724; *Harvey v. Dunlop*, Hill & D. 193; *Kentucky Cent. Rld. v. Thomas*, 79 Ky. 160; *Sorenson v. Menasha Paper, &c. Co.* 56 Wis. 338; *Stainback v. Rae*, 14 How. U. S. 532; *Miller v. Martin*, 16 Mo. 508; *Fanjoy v. Seales*, 29 Cal. 243; *Strouse v. Whittlesey*, 41 Conn. 559; *Taylor v. Atlantic Mut. Ins. Co.* 2 Bosw. 106; *Atchison, &c. Rld. v. Riggs*, 31 Kan. 622; *Hearn v. St. Charles St. Rld.* 34 La. An. 160; *Wolf v. Kilpatrick*, 101 N. Y. 146; *Klatt v. Milwaukee*, 53 Wis. 196;

Sullivan v. Scripture, 3 Allen, 564; *Morgan v. Cox*, 22 Mo. 373; *Brown v. Kendall*, 6 Cush. 292; *Paxton v. Boyer*, 67 Ill. 132; *Holmes v. Mather*, Law Rep. 10 Ex. 261, 14 Eng. Rep. 548, 556, and Moak's note.

² *Jones v. Festiniog Ry.* Law Rep. 3 Q. B. 733, 736; *Vandenburgh v. Truax*, 4 Denio, 464; *James v. Campbell*, 5 Car. & P. 372; *Brown v. Kendall*, 6 Cush. 292; *Davis v. Saunders*, 2 Chit. 639. See *Bizzell v. Booker*, 16 Ark. 308.

³ And see ante, § 104, 116, 131-141.

⁴ Ante, § 104, 115, 148-154; post, § 433 et seq.; *Newton v. Pope*, 1 Cow. 109; *Holmes v. Mather*, Law Rep. 10 Ex. 261; *Chicago, &c. Rld. v. Stumps*, 69 Ill. 409; *Weaver v. Ward*, Hob. 134, *Sir F. Moore*, 864; *Turbervil v. Stamp*, Comb. 459, 12 Mod. 152; *Littleton v. Cole*, 5 Mod. 181.

lawful and proper act, in one who sees his dog and another's fighting, to part them. If he does it carelessly, and thus injures a third person, he is responsible. But where the stick which he not incautiously raises accidentally strikes the other, — in the words of Shaw, C. J., “if it appears that the defendant was doing a lawful act, and unintentionally hit and hurt the plaintiff, — then, unless it also appears to the satisfaction of the jury that the defendant is chargeable with some fault, negligence, carelessness, or want of prudence, the plaintiff fails to sustain the burden of proof, and is not entitled to recover.”¹ But if two persons fight, doing therefore what is unlawful, and one of them accidentally strikes a third, he must pay the damages.² Again, —

§ 182. **Horses in Travelling — Collision.** — If a competent driver goes upon the highway with horses reasonably presumed to be safe and manageable, he is not liable to a person injured by their running away, — as, for example, where they are frightened by a locomotive or other object, — while himself without fault.³ In like manner, where, in the night, two teams collide in consequence of a third standing on the side of the street, the driver of neither seasonably seeing the other, the case is one of inevitable accident, and each must bear his own loss.⁴ So, —

§ 183. **Mill-dam.** — One who builds a mill-dam, upon a proper model, and with good work, is not liable though it breaks away, and the rushing waters destroy another's mill and dam below. If he were negligent therein the consequence would be the reverse.⁵

§ 184. **Steam Engine.** — Where a man lawfully and properly builds on his own premises a steam-engine, he is in the absence of negligence not liable for damages done by its bursting,⁶ or (as in the case of a railroad) by sparks emitted from

¹ *Brown v. Kendall*, 6 Cush. 292, Daly, 487; *Shawhan v. Clarke*, 24 La. An. 390.

² *James v. Campbell*, 5 Car. & P. 372.

⁴ *Strouse v. Whittlesey*, 41 Conn.

³ *Brown v. Collins*, 53 N. H. 442; 559.

Holmes v. Mather, Law Rep. 10 Ex.

⁵ *Livingston v. Adams*, 8 Cow. 175.

261; *Hammack v. White*, 11 C. B. N. S.

⁶ *Marshall v. Welwood*, 9 Vroom,

588; *Quinlan v. Sixth Avenue Rld.* 4

339; *Losee v. Saratoga Paper Co.* 42

the chimney.¹ But it is otherwise if the engine is put into use unlawfully.²

§ 185. *The Doctrine of this Chapter restated.*

Necessity is a supreme law over man, he is powerless to contend against it. Therefore the law of the land never sets itself against this force; and, in whatever terms a law is expressed, it is construed as subject to this exception. The common illustrations of necessity are the requirements of the government in defending the country and in making war; the operation of overpowering physical forces, termed the act of God; the doings of a public enemy; and, most common of all, the every-day accidents of life. But nothing is deemed a necessity which prudence and carefulness, in degree such as are reasonably to be expected from imperfect man, can anticipate and avoid.

How. Pr. 385; Losee v. Buchanan, 51 N. Y. 476. Latshaw, 12 Norris, Pa. 449; Atchison, &c. Rld. v. Riggs, 31 Kan. 622.

¹ Hoff v. West Jersey Rld. 16 Vroom, 201; Jennings v. Pennsylvania Rld. 12 Norris, Pa. 337; Reading, &c. Rld. v. Ry. Law Rep. 3 Q. B. 733.

² Ante, § 178; Jones v. Festiniog

BOOK III.

WRONGS WITH PARTICULAR NAMES.

CHAPTER XIII.

ASSAULT AND BATTERY.

§ 186-188. Introduction.

189-197. What constitutes.

198-200. The Defences.

201-203. Rights of Third Persons.

204. Doctrine of Chapter restated.

§ 186. **Name — Assault — Battery.** — The wrong to be considered in this chapter early received the double name of assault and battery, and as such it has come down to us. But practically in our books the word “assault” is often used to convey the full idea meant by both words. Moreover, —

§ 187. **Civil and Criminal.** — The same act of wrong, whether assault or battery, while actionable as a civil trespass, is also indictable as a crime, and neither proceeding is a bar to the other.¹ Yet there are places at which the civil wrong and the criminal are not absolutely coincident, so that one of the proceedings is maintainable and the other not.²

§ 188. **How Chapter divided.** — We shall consider, I. What

¹ 1 Bishop Crim. Law, § 264-266, *lips v. Kelly*, 29 Ala. 628; *Moses v. Bradley*, 3 Whart. 272.
 where this matter is explained more at large; *Towle v. Blake*, 48 N. H. 92; *Post*, § 196, 197; *Coward v. Bad-*
Rex v. Warden of Fleet, 12 Mod. 337, *deley*, 4 H. & N. 478, 5 Jur. N. s. 414;
 339; *Jones v. Clay*, 1 B. & P. 191; *Higgins v. The State*, 7 Ind. 549.
Crosby v. Leng, 12 East, 409; *Phil-*

constitutes the Civil Wrong ; II. The Defences ; III. The Rights of Third Persons.

I. *What constitutes the Civil Wrong.*

§ 189. **Own Person.**—Every man is the sole custodian of his own physical person. No other has the right even to touch it unlicensed ; and another wrongs him who does to him any physical violence however slight, or puts in motion any physical forces which may reasonably create in him an apprehension that violence will immediately follow. Hence,—

§ 190. **Doctrine and Terms defined.**—Every battery includes an assault, so that the term “assault and battery” is simply an equivalent for “battery” alone. A battery is committed whenever one brings any unlawful physical force into actual contact with the person of another ; an assault, when the physical force, stopping short of a battery, has proceeded so far that he may reasonably apprehend an immediate contact.¹ He who employs the force, either inflicting on the mind the presumptive fear of the contact, or on the body the suffering or even the indignity of actual contact however slight, is liable to the other in damages. To illustrate,—

§ 191. **Instances of Assault.**—It is an assault for one, at such a distance and under such circumstances as render danger apparent, to strike at another with or without a weapon, or present a gun at him, or point a pitchfork at him, or hold up at him the fist, or draw a sword and wave it in a menacing manner.² So also it is, for one on horseback to ride after another on foot, and compel him to run to avoid being beaten.³ And where a man entered the sleeping-room of a blind girl at midnight, sat leaning over her upon the bed, and urged her to an unlawful connection, being “so near as to excite the fear

¹ 1 Bishop Crim. Law, § 548 ; 2 Ib. § 23, 70–72 ; Johnson v. Tompkins, Bald. 571, 600 ; Bishop v. Ranney, 59 Vt. 316.

² Bac. Abr. Assault and Battery, A. ; Genner v. Sparks, 6 Mod. 173, 174 ; United States v. Hand, 2 Wash. C. C.

435 ; Barnes v. Martin, 15 Wis. 240 ; Beach v. Hancock, 7 Fost. N. H. 223 ; Osborn v. Veitch, 1 Fost. & F. 317 ; Read v. Coker, 13 C. B. 850, 17 Jur. 990.

³ Mortin v. Shoppe, 3 Car. & P. 373. See The State v. Sims, 3 Stroh. 137.

and apprehension of force in the execution of his felonious purpose," he was adjudged to have committed an assault.¹

§ 192. **Instances of Battery.** — It is a battery for a man in anger to touch another, however slightly,² to throw on another vitriol³ or even water,⁴ or to strike the horse on which another is riding and thereby cause him to be thrown.⁵ To injure another by putting in motion any of the elements of nature, which thereupon take effect on him, is also a battery;⁶ as, to discharge a gun, knowing him to be sick and liable to be harmed by the noise, if the harm follows,⁷ the battery consisting in the beating of the vibrations of the air upon his ear and nerves. But it is not a battery simply to stand still, like an inanimate object, and by the mere inertia of the motionless body to prevent another's passing through the place occupied.⁸

§ 193. **Mediate or Immediate.** — It is immaterial to the constitution of a battery, whether the touch or violence to the person comes directly from the other's act, or whether it combines with intermediate forces all working out together the final result,⁹ as, in the case of a squib, mentioned in a preceding chapter.¹⁰ So that, where one seized another by the arm, swung him around until he became dizzy, then let him go, striking a third person, who instantly pushed him against a hook whereby he was injured, the first was adjudged answerable for the entire battery.¹¹

§ 194. **The Danger in Assault.** — From the principle that one is not entitled to complain of a thing until it has done him harm,¹² it follows that a mere assault, which touches the mind and does not reach the body, can exist only where there is such an act under such circumstances as may create a rea-

¹ *Newell v. Whitcher*, 53 Vt. 589.

² *Cole v. Turner*, 6 Mod. 149.

³ *Munter v. Bande*, 1 Mo. Ap. 484.

⁴ *Pursell v. Horne*, 3 Nev. & P. 564.

⁵ *Dodwell v. Burford*, 1 Mod. 24.

And see *De Marentille v. Oliver*, 1 Penning. 379; *Kirland v. The State*, 43 Ind. 146.

⁶ 2 Bishop Crim. Law, § 72 a; *Commonwealth v. Stratton*, 114 Mass. 303.

⁷ *Commonwealth v. Wing*, 9 Pick. 1, compared with *Cole v. Fisher*, 11 Mass. 137.

⁸ *Iunes v. Wylie*, 1 Car. & K. 257.

⁹ Ante, § 39 and note.

¹⁰ Ante, § 45.

¹¹ *Ricker v. Freeman*, 50 N. H. 420.

¹² Ante, § 22, 32, 37.

sonable apprehension of danger ; but there need not be danger in fact. An illustration of this, given in all the books, is where one puts his hand on his sword and says to another, "If it were not assize time I would not take such language from you ;" the words negating any intention to commit a battery, hence there is no assault.¹ And it is the same in other cases where either the accompanying words or the circumstances indicate the absence of an intention to proceed to a battery.² But if one presents to another a firearm which, unknown to the other, cannot go off, because not loaded or not cocked, he assaults him ; since he creates the apprehension of danger.³ If there is a mere threat, the danger is too remote, so an assault is not committed.⁴

§ 195. **Wrongful.** — The force must be of a sort deemed by the law wrongful or unlawful.⁵ It need not proceed from an intent to do the particular injury.⁶ For example, a mere friendly touching of one, to call his attention to something, is not an assault or a battery ;⁷ nor is a harm accidentally inflicted in mutual and lawful play.⁸ Nor is it a battery where, in the absence of carelessness, a rider's horse takes fright and runs another person down.⁹ But —

§ 196. **Consent — Plaintiff in Wrong.** — The consent of the parties to a prize-fight or to any other breach of the public peace is, on principle and on authority, no defence to an indictment ; the public being plaintiff, and both parties being as to it in the wrong. And of this sort are various assaults and batteries, but not all.¹⁰ The slight touch, we have just

¹ *Tuberville v. Savage*, 1 Mod. 3. Similar cases are *Blake v. Barnard*, 9 Car. & P. 628 ; *The State v. Crow*, 1 Ire. 375.

² *Woodruff v. Woodruff*, 22 Ga. 237 ; *Commonwealth v. Eyre*, 1 S. & R. 347 ; *The State v. Blackwell*, 9 Ala. 79 ; *Lawson v. The State*, 30 Ala. 14.

³ *Osborn v. Veitch*, 1 Fost. & F. 317 ; *The State v. Church*, 63 N. C. 15 ; *The State v. Shepard*, 10 Iowa, 126 ; *United States v. Kierman*, 3 Cranch C. C. 435.

⁴ *Smith v. The State*, 39 Missis. 521 ;

The State v. Mooney, Phillips, N. C. 434.

⁵ *Alderson v. Waistell*, 1 Car. & K. 358.

⁶ *Weaver v. Ward*, Hob. 134 ; *Welch v. Durand*, 36 Conn. 182 ; *Underwood v. Hewson*, 1 Stra. 596 ; *James v. Campbell*, 5 Car. & P. 372.

⁷ *Coward v. Baddeley*, 4 H. & N. 478, 5 Jur. N. s. 414.

⁸ *Fitzgerald v. Cavin*, 110 Mass. 153.

⁹ *Gibbons v. Pepper*, 4 Mod. 405.

¹⁰ 1 *Bishop Crim. Law*, § 257-263 ; 2 *Ib.* § 35, 36 ; *The State v. Beck*, 1 Hill,

seen,¹ is not of this sort; and rape, one of the most aggravated batteries, is, if the woman consents, neither rape nor even assault.² Now, equally on principle and on authority, an executory contract between two for one to commit on the other an assault of the sort indictable though consented to, would be void as being unlawful.³ But the execution of any unlawful contract places it past annulment, and leaves no right of action in either party against the other.⁴ So that, though a mutual beating by consenting parties is a wrong against the public, because a breach of the peace, it is not such as between themselves; since neither can complain of that to which he consented.⁵ Or, looking upon the wrong as a mere civil one, in no degree as a criminal, still it was mutual; consequently, on another principle already explained, neither party to it could maintain an action against the other.⁶ Such is the distinct and inevitable deduction of the reasoning of the law; applicable, however, in all its consequences, only where the beating was not in excess of the consent.⁷ But we have American cases in which the judges have overlooked the distinction between the civil and criminal remedy,⁸ and so have held that one may maintain his civil suit for a battery to which he consented and in which he participated.⁹ Decisions like these, proceeding on a misapprehension, and overlooking

S. C. 363; *Commonwealth v. Collberg*, 119 Mass. 350; *Reg. v. Lewis*, 1 Car. & K. 419; *Champer v. The State*, 14 Ohio State, 437.

¹ Ante, § 195.

² 1 Bishop Crim. Law, § 259, 261, 733.

³ Bishop Con. § 470 et seq.; *Matthew v. Ollerton*, Comb. 218.

⁴ Bishop Con. § 509 and note, 545, 627.

⁵ Ante, § 49-53.

⁶ Ante, § 54-65; 1 Bishop Crim. Law, § 267; 2 Ib. § 72 b; 2 Bishop Mar. & Div. § 75. Substantially so adjudged in Ireland, both in the Queen's Bench Division and on appeal, in *Hegarty v. Shine*, 14 Cox C. C. 124, 145. And there was deemed to be no English

case holding otherwise, though *Boulter v. Clark*, infra, was cited and commented upon. In *Christopherson v. Bare*, 11 Q. B. 473, 477, it is observed that "an assault must be an act done against the will of the party assaulted, and therefore it cannot be said that a party has been assaulted by his own permission."

⁷ Post, § 200.

⁸ See, for example, the opinion of the court in the criminal case of *Commonwealth v. Collberg*, 119 Mass. 350.

⁹ *Adams v. Waggoner*, 33 Ind. 531; *Stout v. Wren*, 1 Hawks, 420; *Bell v. Hansley*, 3 Jones, N. C. 131; *Logan v. Austin*, 1 Stew. 476. As to *Boulter v. Clark*, Bul. N. P. 16, see a preceding note.

established law not brought to the notice of the judges, should not be followed in future cases.¹ Further as to which, —

§ 197. **Civil and Criminal distinguished — (Forcible Entry — Trespass).** — The adjudications abundantly recognize the distinction between the civil and criminal consequences of a transaction; so that, for example, one may be liable to an indictment when he can justify himself in a civil suit. Thus, a forcible entry on one's own land, to the possession of which he is entitled, is an indictable breach of the peace.² But the person ousted in violation of the criminal law cannot maintain a civil suit against him as for trespass.³ If the owner goes further, and needlessly beats the unlawful occupant, he is liable civilly as well as criminally for the battery; because a man's being found on my premises does not justify me in inflicting on him this sort of private punishment.⁴

II. *The Defences.*

§ 198. **Elsewhere.** — The right of parents, teachers, officers of the law, and other persons in special relations, to commit

¹ See post, § 200 and note.

² 2 Bishop Crim. Law, § 490, 500.

³ *Ives v. Ives*, 13 Johns. 235; *Hyatt v. Wood*, 4 Johns. 150; *Meader v. Stone*, 7 Met. 147; *Taunton v. Costar*, 7 T. R. 431; *Harvey v. Brydges*, 14 M. & W. 437; *Beecher v. Parmele*, 9 Vt. 352; *Higgins v. The State*, 7 Ind. 549; *Low v. Elwell*, 121 Mass. 309, 312, 313, Gray, C. J. observing: "If the landlord forcibly enters and expels him, the landlord may be indicted for the forcible entry. But he is not liable to an action of tort for damages, either for his entry upon the premises, or for an assault in expelling the tenant, provided he uses no more force than is necessary. The tenant cannot maintain an action in the nature of trespass *quare clausum fregit*, because the title and the lawful right to the possession are in the landlord, and the tenant, as against him, has no right of occupation whatever. He cannot

maintain an action, in the nature of trespass to his person, for a subsequent expulsion with no more force than necessary to accomplish the purpose; because the landlord, having obtained possession by an act which, though subject to be punished by the public as a breach of the peace, is not one of which the tenant has any right to complain, has, as against the tenant, the right of possession of the premises; and the landlord, not being liable to the tenant in an action of tort for the principal act of entry upon the land, cannot be liable to an action for the incidental act of expulsion, which the landlord, merely because of the tenant's own unlawful resistance, has been obliged to resort to in order to make his entry effectual."

⁴ *Sampson v. Henry*, 11 Pick. 379, 387; *Sampson v. Henry*, 13 Pick. 36. But see *Blades v. Higgs*, 10 C. B. N. S. 713, 7 Jur. N. S. 1289.

assault and battery on others in their care, by way of correction or restraint, will be considered under their respective titles. So also will be the authority to employ force for the protection of real and personal property and in self-defence. But, within the limits of this latter topic, something may here be said of —

§ 199. **Assault to repel Assault** — (**Circumstances of Assault**). — Abuse by mere words,¹ however violent or insulting, is not an assault; and one has no right to assault another in repelling such abuse.² But he may show it in mitigation of damages,³ that is, at least by some opinions, of punitory, yet not of actual damages.⁴ An assault or battery may be repelled by force, not exceeding in amount and kind what under the particular circumstances is reasonable.⁵ All the circumstances should be taken into the account;⁶ for example, what the assaulted person knew of the assailant's character for turbulence and quarrelsomeness,⁷ whether the weapon was the fist⁸ or loaded arms,⁹ and the extent and nature of the danger. Now, —

§ 200. **Excess in Repelling**. — He who meets his assailant with excessive violence is answerable to him in damages for the excess.¹⁰ And, in such a case, the New York court would not permit the party who had thus exceeded the proper

¹ *Bac. Abr. Assault and Battery, A.*; *Smith v. The State*, 39 *Missis.* 521.

² *Richardson v. Zuntz*, 26 *La. An.* 313; *Thompson v. Mumma*, 21 *Iowa*, 65; *Cushman v. Ryan*, 1 *Story*, 91.

³ *Ib.*; *Martin v. Minor*, 50 *Missis.* 42; *Richardson v. Hine*, 42 *Conn.* 206; *Ireland v. Elliott*, 5 *Iowa*, 478; *Murray v. Boyne*, 42 *Mo.* 472.

⁴ *Corcoran v. Harran*, 55 *Wis.* 120; *Scott v. Fleming*, 16 *Bradw.* 539.

⁵ *Ogden v. Claycomb*, 52 *Ill.* 365; *Murray v. Boyne*, 42 *Mo.* 472; *Galagher v. The State*, 3 *Minn.* 270; *Morris v. Platt*, 32 *Conn.* 75; *Scribner v. Beach*, 4 *Denio*, 448; *Castner v. Sliker*, 4 *Vroom*, 507; *Reece v. Taylor*, 4 *Nev.* & *M.* 469, 470; *People v. Gulick*, *Hill & D.* 229; *Cockcroft v. Smith*, 2 *Salk.* 642; *Gizler v. Witzel*, 82 *Ill.* 322.

⁶ *Root v. Sturdivant*, 70 *Iowa*, 55; *Gronan v. Kukkuck*, 59 *Iowa*, 18; *Dailey v. Houston*, 58 *Mo.* 361; *Currier v. Swan*, 63 *Maine*, 323; *Ward v. Blackwood*, 41 *Ark.* 295; *Backstack v. Banks*, 7 *Ben.* 355; *Williams v. Townsend*, 15 *Kan.* 563; *Blake v. Burke*, 42 *Md.* 45.

⁷ *Knight v. Smythe*, 57 *Vt.* 529; *Harrison v. Harrison*, 43 *Vt.* 417.

⁸ *Floyd v. The State*, 36 *Ga.* 91.

⁹ *Morris v. Platt*, *supra*.

¹⁰ *Harrison v. Harrison*, 43 *Vt.* 417; *Ayres v. Birch*, 35 *Mich.* 501; *Curtis v. Carson*, 2 *N. H.* 539; *Brown v. Gordon*, 1 *Gray*, 182; *Dole v. Erskine*, 35 *N. H.* 503; *Philbrick v. Foster*, 4 *Ind.* 442; *Hazel v. Clark*, 3 *Harring. Del.* 22; *Trogden v. Henn*, 85 *Ill.* 237.

bounds in defence to recover anything of the original assailant.¹ But the New Hampshire tribunal dissented from this, and held that each party might sue the other, the one for the original assault, and the other for the excess of repelling force.² It is plain in this sort of case, and on both sides of the question it is admitted, that each party committed on the other an assault and battery. The New Hampshire court regards the facts the same as they would stand if the person assailed had simply repelled the assault by lawful force; then, in a separate transaction, say the next day, had put forth the unlawful. In this view, there can be no question of the correctness of its conclusion. But it is not the habit of the law to look at things so. There is in fact but one transaction, and therein both parties are in the wrong. Why, then, is not the doctrine of a previous chapter applicable to the case,³ resulting in the conclusion that the court will help neither? But this argument extends much further than simply to sustain the New York doctrine against the New Hampshire one; it would overthrow what is established by a long line of authorities, namely, the right of the original trespasser to recover compensation for the excess in defence. The course of our law is ordinarily to leave an anomaly of this sort for legislation to correct or not as may be deemed best, while the courts travel on in the line of precedent.⁴

¹ *Elliott v. Brown*, 2 Wend. 497.

² *Dole v. Erskine*, 35 N. H. 503.

³ *Ante*, § 54-65.

⁴ Compare with *ante*, § 196. The reader will see, without special explanation, that the reasons for overruling the erroneous doctrine there are stronger than the reasons here, and in a measure different. One obvious difference is, that in the other case there are only isolated decisions, founded on no ancient usage, and proceeding from misapprehension; while, if I mistake not, the decisions on the present question are alike ancient, modern, and uniform. In intimating that they will not probably be judicially overruled, I simply express my ideas of how things com-

monly are, not how they ought to be. If one man strikes another, and the other gives back a pretty heavy blow, I do not personally think it to be the duty of a court and jury to sit upon the quarrel and determine which of the two wrong-doers did, as between themselves, cook the thing too brown. I should say that both ought to be turned out of court. And I should not deem the precedents in assault and battery cases to preclude the tribunal from following thus the common course of the courts in this sort of case. On the other hand, if a person who had been lightly struck should take occasion, not as a mere return for the battery, but of malice, to inflict an inordinate beating upon the

III. *The Rights of Third Persons.*

§ 201. **In General.** — One who has suffered from another's assault and battery on a third person may, in the absence of any special fact creating an exemption, recover of the other his damages.¹ Thus, —

§ 202. **Accidental Hurt.** — If a missile unlawfully meant for a particular person takes effect by accident on another, the latter may have his suit against the sender, the same as though he were the one intended to be hit.² But if the sender of the missile was justified therein, — as, if he discharged a pistol in lawful self-defence and without negligence,³ — another casually injured thereby has no remedy; the law regarding the result as an inevitable accident.⁴ Again, —

§ 203. **Owing Service.** — When an unlawful battery disables a person who by contract or otherwise owes service to another, not only is the wrong-doer liable to the person directly injured, but the one to whom the service is due may also have his action for the loss.⁵

§ 204. *The Doctrine of this Chapter restated.*

The law takes cognizance only of the grosser personal wrongs which men commit on one another. A harassment by mere words of abuse may be a marked breach of moral duty, but the law will not redress it in an action. When the lifting of a weapon or the hand, or the setting in motion of any physical thing, creates an immediate apparent danger, however slight, to the person of another, or when it goes

wrong-doer, or to maim him, I should look upon this conduct as a thing disconnected from any real or properly assumed right of self-defence, and therefore as entitling the injured party to damages.

¹ And see ante, § 181.

² *Peterson v. Haffner*, 59 Ind. 130; *Murphy v. Wilson*, 44 Mo. 313.

³ *Morris v. Platt*, 32 Conn. 75;

Plummer v. The State, 4 Texas Ap. 310.

⁴ Ante, § 176-184; *Paxton v. Boyer*, 67 Ill. 132,

⁵ *Rosiere v. Sawkins*, Holt, 460; *Savill v. Kirby*, 10 Mod. 385, 386; *Cincinnati, &c. Rld. v. Chester*, 57 Ind. 297; *Hunt v. Wotton*, T. Raym. 259, 260.

further and hits the person, if there is no valid excuse for it, an assault in the one case or a battery in the other is committed. And for an assault or for a battery redress may be had in the courts. If the circumstances justify the act, the law does not deem that there has been an assault or a battery. In this case, neither a party nor a third person has any remedy; in the other, even a third person may recover of the wrong-doer compensation for what he has suffered. For he who has received a damage from another's altogether rightful act, must bear it as one of the consequences of living in society; but the sufferer from a wrong has his remedy, whether the wrong-doer meant a harm to him or not.

CHAPTER XIV.

FALSE IMPRISONMENT.

§ 205. **Like Assault and Battery.** — False imprisonment is as well a criminal wrong as a civil, the limits of the indictable and actionable being at places not absolutely identical.¹ It commonly, but not necessarily or always, begins with assault and battery, whereof it is a sort of continuance.

§ 206. **Defined.** — It is any unlawful physical restraint by one of another's liberty, whether in a prison or elsewhere, in a place stationary or moving, under claim of authority or not, by bolts and bars, by threats overpowering the will, or by any other means.²

§ 207. **One Direction.** — So to obstruct one's way as to prevent his going in the particular direction he desires, while he is free to pass in any other, was in England adjudged by the majority of a divided court not to constitute false imprisonment, though it seems still to have been regarded as an actionable wrong.³ Assuming this decision to be correct, as probably we may, it relates only to the name of the wrong, and the form of the declaration.

§ 208. **Illustrations** — of false imprisonment are the wrongful locking of the door of a room upon one known to be in it,⁴ fraudulently getting possession of an infant and detaining it from the person entitled to its custody,⁵ and compelling one

¹ Ante, § 187.

² 2 Bishop Crim. Law, § 748; Floyd v. The State, 7 Eng. 43; Pease v. Burt, 3 Day, 485; Hobert's Case, Cro. Car. 209; McNay v. Stratton, 9 Bradw. 215; Woodward v. Washburn, 3 Denio, 369; Johnson v. Tompkins, Bald. 571; Pike v. Hanson, 9 N. H. 491; Smith

v. The State, 7 Humph. 43; Holley v. Mix, 3 Wend. 350.

³ Bird v. Jones, 7 Q. B. 742.

⁴ Woodward v. Washburn, 3 Denio, 369.

⁵ Robalina v. Armstrong, 15 Barb. 247.

to remain at a place by firing upon him and threatening him.¹ But —

§ 209. **Wrongful Arrest** — is the most familiar illustration. If an officer or private person, assuming to act by command or permission of the law, detains one without its authorization in fact, whether believing himself to have the authority or not, he must answer to the arrested person for a false imprisonment.² Instances are: arresting one in a civil action on Sunday,³ or on a warrant void upon its face.⁴ And, in such a case, —

Procurer — One who procured the arrest, whether present or absent when it was made, is in like manner answerable.⁵

§ 210. **Subsequently Abusing Process — Not Discharging.** — An abuse of a lawful arrest is also false imprisonment; as, cruelly treating the arrested person, insulting him, depriving him of proper food, imposing on him undue hardships, extorting something from him, or doing to him any other like wrong not within the process.⁶ So if an arrested person becomes entitled to his discharge, — as, by tendering bail,⁷ or by the authorized time for detention having elapsed,⁸ or otherwise,⁹ — he can have this action against those from whom

¹ *McNay v. Stratton*, 9 Bradw. 215.

² *Green v. Rumsey*, 2 Wend. 611; *Tubbs v. Tukey*, 3 Cush. 438; *Phillips v. Trull*, 11 Johns. 486; *Scott v. Ely*, 4 Wend. 555; *Anonymous*, 7 Mod. 52; *Touhey v. King*, 9 Lea, 422; *Vaughn v. Congdon*, 56 Vt. 111; *Miller v. Foley*, 28 Barb. 630.

³ *Wilson v. Tucker*, 1 Salk. 78; s. c. nom. *Wilson v. Guttery*, 5 Mod. 95.

⁴ *Thorpe v. Wray*, 68 Ga. 359; *Gelzenleuchter v. Niemeyer*, 64 Wis. 316.

⁵ Post, § 211; *Clifton v. Grayson*, 2 Stew. 412; *Floyd v. The State*, 7 Eng. 43; *Stoddard v. Bird*, Kirby, 65; *Burlingham v. Wylee*, 2 Root, 152; *Stoyel v. Lawrence*, 3 Day, 1; *Vredenburgh v. Hendricks*, 17 Barb. 179; *Curry v. Pringle*, 11 Johns. 444; *Winslow v. Hathaway*, 1 Pick. 211; *Emery v. Hapgood*, 7 Gray, 55; *Cody v. Adams*, 7 Gray, 59; *Wheeler v. Whiting*, 9 Car.

& P. 262; *Hopkins v. Crowe*, 7 Car. & P. 373; *Bright v. Patton*, 5 Mackey, 534.

⁶ *Doyle v. Russell*, 30 Barb. 300; *Wood v. Graves*, 144 Mass. 365. Some of the leading cases cited by the learned judge in the last case are *Esty v. Wilmot*, 15 Gray, 168; *Malcom v. Spoor*, 12 Met. 279; *Grainger v. Hill*, 4 Bing. N. C. 212; *Page v. Cushing*, 38 Maine, 523; *Holley v. Mix*, 3 Wend. 350; *Baldwin v. Weed*, 17 Wend. 224.

⁷ *Smith v. Hall*, 2 Mod. 31; *Salmon v. Percivall*, Cro. Car. 196; *Creswell v. Hoghton*, 6 T. R. 355; *Gibbs v. Randlett*, 58 N. H. 407; *Manning v. Mitchell*, 73 Ga. 660.

⁸ *Lynch v. Metropolitan Elev. Ry.* 90 N. Y. 77; *Anderson v. Beck*, 64 Missis. 113.

⁹ *Tracy v. Williams*, 4 Conn. 107; *Sthreshley v. Fisher*, Hardin, 257; *Hayes v. Mitchell*, 69 Ala. 452.

the wrong proceeded. But, under the common-law forms of action, it will not always be trespass, which is the form in technical false imprisonment, it will sometimes be case.¹ Further as to the arrest,—

§ 211. **Process Regular.**—If the process on which an officer makes an arrest is on its face regular, and from a court or magistrate having the jurisdiction, he will be justified, whatever be the liabilities of other persons, and though prior steps were erroneous.² He will even be protected though the one arrested is privileged,—as, for example, being a going or returning witness,³—and the officer, whose duty it is to follow his precept, is aware of the privilege.⁴ So also—

Procurer.—While, in general,⁵ the mere procurer of a wrongful arrest made by another is liable, one is not so who simply states to the proper officers the facts, whether he also swears to them or not, and they act upon their independent judgment;⁶ as, if a magistrate having jurisdiction passes upon facts thus communicated, and thereupon issues his warrant.⁷ If, in the latter circumstances, there is any liability, the common-law action will be case, which is the form for malicious prosecution, and not trespass. And thereupon the rule in malicious prosecution will apply, that there must be both malice and want of probable cause.⁸ But,—

¹ The preceding cases; also *Crowell v. Gleason*, 1 Fairf. 325; *Stanton v. Seymour*, 5 McLean, 267; *Holley v. Mix*, 3 Wend. 350; *Wheaton v. Whittemore*, 49 Mich. 348; *Herzog v. Graham*, 9 Lea, 152.

² 1 Bishop Crim. Procd. § 187; *Davis v. Bush*, 4 Blackf. 330; *Stewart v. Hawley*, 21 Wend. 552.

³ *Smith v. Jones*, 76 Maine, 138; *Cameron v. Lightfoot*, 2 W. Bl. 1190; *Tarlton v. Fisher*, 2 Doug. 671.

⁴ *Magnay v. Burt*, 5 Q. B. 381. And see *Yearsley v. Heane*, 14 M. & W. 322.

⁵ *Ante*, § 209; *Green v. Elgie*, 5 Q. B. 99.

⁶ *Murphy v. Walters*, 34 Mich. 180; *Benham v. Vernon*, 5 Mackey, 18;

Lock v. Ashton, 12 Q. B. 871; *Hopkins v. Crowe*, 7 Car. & P. 373.

⁷ *Post*, § 230; *West v. Smallwood*, 3 M. & W. 418; *Beaty v. Perkins*, 6 Wend. 382; *Coupal v. Ward*, 106 Mass. 289; *Hallock v. Dominy*, 69 N. Y. 238; *Waldheim v. Sichel*, 1 Hilton, 45; *Dusy v. Helm*, 59 Cal. 188; *Brown v. Chapman*, 6 C. B. 365; *Fischer v. Langbein*, 13 Abb. N. Cas. 10; *Langford v. Boston, &c. Rld.* 144 Mass. 431.

⁸ *Murphy v. Martin*, 58 Wis. 276; *Krebs v. Thomas*, 12 Bradw. 266; *Johnson v. Ebberts*, 6 Sawyer, 538; *Legallee v. Blaisdell*, 134 Mass. 473; *McCarthy v. De Armit*, 3 Out. Pa. 63; *Hogg v. Pinckney*, 16 S. C. 387; *Seeger v. Pfeifer*, 38 Ind. 13; *Colter v. Lower*,

§ 212. **Malice.**—In false imprisonment proper, as distinguished from malicious prosecution, malice is not required.¹ For example, —

§ 213. **Wrong Person.**—Where the officer, acting however honestly, arrests the wrong person, not being misled thereto by the person himself, it is a case of false imprisonment.² And it is not otherwise though the one arrested was really the one meant, the name being mistaken in the warrant.³

§ 214. **Force or not in Arresting.**—To constitute an arrest, equally in these false imprisonment cases and in others, the officer need not touch the person if he submits without, otherwise he must, or must do something else to gain custody of him, such as the locking of a door.⁴ And the action for false imprisonment will not lie against an officer who has proceeded less far.⁵

§ 215. **The Parties.**—Explanations will appear in other connections showing more of the liability of the differing parties to this wrong.⁶ It remains only to add here that, —

§ 216. **Third Persons Suffering.**—In false imprisonment, the same as in assault and battery,⁷ a third person who has suffered from the wrong may have his redress against the wrong-doer; as, for example, where a servant has been falsely imprisoned, whereby the master has been deprived of his services.⁸

§ 217. *The Doctrine of this Chapter restated.*

Personal liberty is a natural right. No one can take it from another, except by pursuing the steps which the law has laid down, without being responsible to him in damages.

35 Ind. 285; *Gourgues v. Howard*, 27 La. An. 339.

¹ *Akin v. Newell*, 32 Ark. 605; *Colter v. Lower*, 35 Ind. 285.

² *Price v. Harwood*, 3 Camp. 108, and the reporter's note. The mistake may be shown in mitigation of damages. *Formwalt v. Hylton*, 66 Texas, 288. See *Comer v. Knowles*, 17 Kan. 436.

³ *Scott v. Ely*, 4 Wend. 555; *Scheer* 369.

v. Keown, 29 Wis. 586; *Shadgett v. Clipson*, 8 East, 328; *Gurnsey v. Lovell*, 9 Wend. 319.

⁴ Ante, § 208; 1 Bishop Crim. Procced. § 156, 157.

⁵ *Hill v. Taylor*, 50 Mich. 549.

⁶ Post, § 517 et seq.

⁷ Ante, § 201-203.

⁸ *Woodward v. Washburn*, 3 Denio,

Theoretically, a man cannot lose his liberty except where he forfeits it by a violation of law. But practically he may ; as, where it is taken from him by the law's procedure to ascertain whether or not he is guilty, or where an erroneous judgment is pronounced against him, or where a jury has convicted him through mistake, or where otherwise it has become necessary to imprison him as a step in the administration of justice. And, whether a man has really done wrong or not, another may imprison him when the course of the law permits ; but, when it does not, he who imprisons one however guilty in fact commits a false imprisonment. A familiar illustration of the lawful imprisonment of an innocent person is where a witness cannot give bail for his appearance to testify in a criminal cause, and he is put in jail to secure his presence.

CHAPTER XV.

MALICIOUS PROSECUTION.

- § 218, 219. Introduction.
- 220-230. General Doctrine.
- 231-237. The Malice.
- 238-242. Want of Probable Cause.
- 243-245. In what Cases.
- 246-249. After what Steps.
- 250. Doctrine of Chapter restated.

§ 218. **Malicious Arrest.** — Where one maliciously procures another to be arrested, not in the course of a regular suit or prosecution, but by some summary process, it is often and properly termed a malicious arrest. Still it may be regarded equally as a malicious prosecution; therefore, for convenience, and without violating the proprieties of the language, it will be included in this chapter.¹

§ 219. **How Chapter divided.** — We shall consider, I. The General Doctrine; II. The Malice; III. The Want of Probable Cause; IV. In what Cases; V. After what Steps.

I. *The General Doctrine.*

§ 220. **Distinguished from False Imprisonment.** — The wrong of malicious prosecution, unlike false imprisonment, is not limited to violations of personal liberty, but extends to disturbances of property rights as well. It consists of an unjustifiable employment of the processes of the law, while false imprisonment is an act done in violation of those processes. Under the common-law practice, the action for false imprisonment is trespass, that for malicious prosecution is case.²

¹ And see *Ahern v. Collins*, 39 Mo. 145.

² Ante, § 210, 211; *Colter v. Lower*, 35 Ind. 285; *Belk v. Broadbent*, 3 T. R.

§ 221. **Defined.**—Malicious prosecution is the putting in motion of any process of the law, and the carrying of it forward until it terminates in favor of the one prosecuted, maliciously and without reasonable or probable cause, to his injury in respect either of personal security or of property.¹ Also,—

§ 222. **Defamation.**—The element of defamation of character—slander or libel—is sometimes looked upon as justifying an action for malicious prosecution. It is clearly laid down that slander may be propagated by a false suit. And it has been intimated that in such circumstances an aggrieved person may elect the one of the two remedies he prefers.² Not a great proportion of the cases practically assume this aspect, but the doctrine is just in principle, and it is occasionally met with in the books.

§ 223. **The Inevitable.**—The existence of courts and the carrying on of their processes are a necessity for imperfect man. And it cannot be otherwise than that defendants will, sometimes justly and sometimes unjustly, win a part of the litigated causes. So that loss by judicial proceedings, when properly brought and conducted, belongs to the common accidents of life, explained in a preceding chapter.³ In such a

183, 185; *Pollard v. Evans*, 2 Show. 50; *Elsee v. Smith*, 1 D. & R. 97; *Stewart v. Thompson*, 1 Smith, Pa. 158; *Sleight v. Ogle*, 4 E. D. Smith, 445.

¹ One looks in vain into the books for the anticipated definitions of this wrong. Bouvier, fairly well, defines it to be “a wanton prosecution made by a prosecutor in a criminal proceeding, or a plaintiff in a civil suit, without probable cause, by a regular process and proceeding, which the facts did not warrant, as appears by the result.” *Law Dict. tit. Malicious Prosecution*. And see *Abrath v. North Eastern Ry.* 11 Q. B. D. 440, 448, 455, affirmed, 11 Ap. Cas. 247. Lord Campbell says: “To put into force the process of the law maliciously and without any reasonable or probable cause is wrongful; and, if thereby another is prejudiced in prop-

erty or person, there is that conjunction of injury and loss which is the foundation of an action on the case.” *Churchill v. Siggers*, 3 Ellis & B. 929, 937. Repeated, post, § 243. It should be borne in mind that a definition is simply the epitomized law of its subject, and that the true and only test of its accuracy is in a comparison of it with the extended law as adjudged.

² *Jarnigan v. Fleming*, 43 Missis. 710; *Byne v. Moore*, 5 Taunt. 187, 191; *Miller v. Brown*, 3 Misso. 127; *Bodwell v. Osgood*, 3 Pick. 379, 383; *Savil v. Roberts*, 1 Salk. 13, 14; *Quartz Hill Gold Mining Co. v. Eyre*, 11 Q. B. D. 674, 683, 684. And see *Western News Co. v. Wilmarth*, 33 Kan. 510; *Hart v. Baxter*, 47 Mich. 198; post, § 227.

³ Ante, § 176–184.

case, the losing party can have no redress.¹ But it is not necessary that men be permitted to abuse judicial process. Hence,—

§ 224. **Remedy for Abuse of Process.**—The law has provided the action of malicious prosecution as a remedy for private injuries from abuse of the processes of the courts. Necessarily this action must, like all others, have its defined limits and its rules; and it cannot be otherwise than that both should be in some degree technical. The result of the decisions is, that this action will lie for the abuse whenever the following things concur,—

§ 225. **Malice and Want of Probable Cause.**—There must be both malice and the want of probable cause combining.² And these must be affirmatively shown by the plaintiff.³

§ 226. **Termination of Proceeding.**—The proceeding in which the abuse occurred must have terminated, and in favor of the party complaining in the malicious prosecution suit.⁴ Lastly,—

§ 227. **Damage.**—The person complaining of the abuse must have sustained therefrom some sort of legal damage.⁵ If he has been subjected to the payment of a sum of money,⁶ or arrested,⁷ or defamed,⁸ there is legal damage, and the same

¹ *Wasserman v. Louisville, &c. Ry.* 28 Fed. Rep. 802; *Smith v. Adams*, 27 Texas, 28; *Vanduzor v. Linderman*, 10 Johns. 106; *Lindsay v. Larned*, 17 Mass. 190; *Reynolds v. Kennedy*, 1 Wils. 232.

² *Crescent City Live Stock Co. v. Butchers Union*, 120 U. S. 141; *Preston v. Cooper*, 1 Dil. 589; *Burnap v. Albert*, Taney, 244; *Vinal v. Core*, 18 W. Va. 1; *Murray v. Long*, 1 Wend. 140; *Pangburn v. Bull*, 1 Wend. 345; *Morris v. Corson*, 7 Cow. 281; *Harkrader v. Moore*, 44 Cal. 144; *Dietz v. Langfitt*, 13 Smith, Pa. 234; *Shafer v. Loucks*, 58 Barb. 426; *Farmer v. Darling*, 4 Bur. 1971; *Porter v. White*, 5 Mackey, 180; *Gonzales v. Cobliner*, 68 Cal. 151.

³ *Sutton v. Anderson*, 7 Out. Pa. 151; *Emerson v. Cochran*, 1 Am. Pa. 619; *Incedon v. Berry*, 1 Camp. 203,

note; *Palmer v. Richardson*, 70 Ill. 544; *Davie v. Wisher*, 72 Ill. 262; *Calef v. Thomas*, 81 Ill. 478; *Trodden v. Deckard*, 45 Ind. 572.

⁴ *Crescent City Live Stock Co. v. Butchers Union*, 120 U. S. 141; *Vinal v. Core*, 18 W. Va. 1; *Wood v. Laycock*, 3 Met. Ky. 192; *Smith v. Shackelford*, 1 Nott & McC. 86; *Pratt v. Page*, 18 Wis. 337; *Steel v. Williams*, 18 Ind. 161; *Fisher v. Bristow*, 1 Doug. 215; *Morgan v. Hughes*, 2 T. R. 225; *Walker v. Martin*, 43 Ill. 508; *Hewitt v. Wooten*, 7 Jones, N. C. 182.

⁵ *Preston v. Cooper*, 1 Dil. 589; *Cotterell v. Jones*, 11 C. B. 713, 16 Jur. 88; *Byne v. Moore*, 5 Taunt. 187, 191.

⁶ *Sandback v. Thomas*, 1 Stark. 306.
⁷ *Sitton v. Farr*, Rice, 303; *Ray v.*

Law, Pet. C. C. 207.

⁸ *Ante*, § 222; *Quartz Hill Gold Mining Co. v. Eyre*, 11 Q. B. D. 674.

appears in various vexatious proceedings without special allegation and proof.¹ This doctrine proceeds from the general one explained in a previous chapter,² that only where an injury combines with a wrong can there be a civil action.

§ 228. **Good or bad Malicious Proceeding.** — Ordinarily one prosecuted maliciously suffers the same whether the proceeding against him is in form good or ill. And the prosecutor does and should incur the same responsibility.³ But if the defect is, for example, such as renders the warrant of arrest whereof he complains void, the case becomes one of false imprisonment,⁴ not of malicious prosecution.⁵ Within which distinction formal defects in the indictment or complaint, insufficiency of proof, and the like, do not work the nullity which takes away the action for malicious prosecution;⁶ yet, by what seems to be the better opinion, want of jurisdiction in the court or magistrate does,⁷ requiring the action to be trespass for false imprisonment.⁸ Others hold that even in this case the suit may be for malicious prosecution.⁹

§ 229. **Innocence Essential.** — One cannot complain that he was maliciously prosecuted for something whereof he was guilty; because in such a case he has suffered no wrong.¹⁰ And if he was acquitted, still the defendant in the malicious prosecution suit may, if he has the evidence, prove his guilt.¹¹

§ 230. **Giving Information.** — Merely to supply an officer or magistrate with information, believed to be correct, regarding the commission of a supposed crime or the evidence of it,

¹ *Pangburn v. Bull*, 1 Wend. 345; *v. Howard*, 73 Mo. 25; *Sweet v. Negus*, 30 Mich. 406; *Gibbs v. Ames*, 119 Mass. 60, 66; *Pippet v. Hearn*, 5 B. & Ald. 634; *Savil v. Roberts*, 1 Salk. 13, 14; *Chambers v. Robinson*, 1 Stra. 691.

McChesney, 4 Yeates, 507.

² *Ante*, § 22-34.

³ *Dennis v. Ryan*, 65 N. Y. 385.

⁴ *Ante*, § 209, 211.

⁵ *Kramer v. Lott*, 14 Wright, Pa. 495; *Braveboy v. Cockfield*, 2 McMul. 270. And see *Bodwell v. Osgood*, 3 Pick. 379, 383; *Turpin v. Remy*, 3 Blackf. 210; *Morgan v. Hughes*, 2 T. R. 225.

⁶ *Streight v. Bell*, 37 Ind. 550; *Shaul v. Brown*, 28 Iowa, 37; *Stocking*

⁷ *Bixby v. Brundige*, 2 Gray, 129.

⁸ *Whiting v. Johnson*, 6 Gray, 246.

⁹ *Morris v. Scott*, 21 Wend. 281; *Stone v. Stevens*, 12 Conn. 219; *Goslin v. Wilcock*, 2 Wils. 302.

¹⁰ *Ante*, § 22 et seq.

¹¹ *Newton v. Weaver*, 13 R. I. 616; *Parkhurst v. Masteller*, 57 Iowa, 474.

whereon the officer or magistrate acts on his own responsibility, cannot be the foundation of the suit we are considering.¹ There is here neither a prosecution nor a moving of others to prosecute.² And, within this principle, one who makes to a magistrate a true statement of facts, whereon the latter issues a warrant to arrest another as for a crime which the facts do not in law constitute, does not thereby commit a malicious prosecution.³

II. *The Malice.*

§ 231. **General.**—The word malice is very much used in legal writings, but its meaning is variable, depending largely upon the subject to which it is applied.⁴ Speaking in a general way, a learned English judge said quite aptly that, “in its legal sense, it means a wrongful act done intentionally without just cause or excuse,” and “ill will against a person” is not necessarily an ingredient therein.⁵ In the law of malicious prosecution, it requires the mental condition or purpose which judicial decision has made an indispensable element⁶ in the wrong. It is not a mere fiction of law, but it must be malice in fact.⁷ Taking these views for our guide, —

§ 232: **Defined.**—The malice in malicious prosecution is not necessarily, while it may be, ill will to the individual, but it is any evil or unlawful purpose, as distinguished from that of promoting the justice of the law.⁸ For example, —

¹ Ante, § 211.

² *Farnam v. Feeley*, 56 N. Y. 451; *Teal v. Fissel*, 28 Fed. Rep. 351; *Hope v. Evered*, 17 Q. B. D. 338, 16 Cox C. C. 112; *Burns v. Erben*, 1 Rob. N. Y. 555; *Sisk v. Hurst*, 1 W. Va. 53.

³ *Leigh v. Webb*, 3 Esp. 165; *Hahn v. Schmidt*, 64 Cal. 284.

⁴ Compare with the malice in libel and slander, post, § 257, 306.

⁵ *Bromage v. Prosser*, 4 B. & C. 247, 255, Bayley, J.

⁶ Ante, § 225.

⁷ *Pullen v. Glidden*, 66 Maine, 202; *Turner v. O'Brien*, 5 Neb. 542.

⁸ *Carothers v. McIlhenny Co.* 63 Texas, 138; *Pullen v. Glidden*, 66 Maine, 202; *Spear v. Hiles*, 67 Wis. 350; *Harp- ham v. Whitney*, 77 Ill. 32; *Krug v. Ward*, 77 Ill. 603; *Ross v. Langworthy*, 13 Neb. 492. “The malice necessary to be shown in order to maintain this action, is not necessarily revenge or other base and malignant passion. Whatever is done wilfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is in legal

§ 233. **To collect Debt.** — One to whom another owes something may justly and lawfully bring his civil suit to enforce payment. But it is a perversion of the remedies of the law to attempt the same thing through a criminal proceeding; therefore he who does it acts, within our definition, maliciously. In other words, the pursuit of the lawful end by the intentionally unlawful means satisfies the law's demand of malice in malicious prosecution.¹ Now, —

§ 234. **Evidence — Jury.** — Malice being thus a condition of the mind, an intent, and not an outward act, it can be proved only as an inference from other things,² unless, what is not ordinarily to be expected, the party himself being a witness³ testifies to it. Therefore, also, the fact of its existence is never a question of law for the court, but it is always to be found by the jury.⁴ Of this, the sort of case stated in the last section is one illustration. Other illustrations are, —

§ 235. **Want of Probable Cause.** — If the jury are satisfied that the prosecution was without probable cause, they may, and almost as a matter of course they will, infer malice as the motive which impelled thereto. But they are not legally obliged to draw this inference, and circumstances are quite supposable wherein the inference would be unjust.⁵ Again, —

§ 236. **Advice of Counsel.** — If one before commencing the prosecution laid the case fairly, fully, and honestly before counsel presumably competent, and he was thereupon advised

contemplation malicious. That which is done contrary to one's own conviction of duty, or with a wilful disregard of the rights of others, whether it be to compass some unlawful end, or some lawful end by unlawful means, or to do a wrong and unlawful act knowing it to be such, constitutes legal malice." Shaw, C. J. in *Wills v. Noyes*, 12 Pick. 324, 328.

¹ *Schmidt v. Weidman*, 13 Smith, Pa. 173; *Ross v. Langworthy*, 13 Neb. 492; *Krug v. Ward*, 77 Ill. 603.

² 1 Bishop Crim. Proced. § 1101.

³ *Turner v. O'Brien*, 5 Neb. 542.

⁴ *Stewart v. Sonneborn*, 98 U. S. 187, 193.

⁵ *Holliday v. Sterling*, 62 Mo. 321; *Closson v. Staples*, 42 Vt. 209; *Strickler v. Greer*, 95 Ind. 596; *Mitchell v. Jenkins*, 5 B. & Ad. 588; *Murphy v. Hobbs*, 7 Colo. 541; *Block v. Meyers*, 33 La. An. 776; *Kaufman v. Wicks*, 62 Texas, 234; *Wanser v. Wyckoff*, 9 Hun, 178; *Bauer v. Clay*, 8 Kan. 580; *Heap v. Parrish*, 104 Ind. 36; *Roy v. Goings*, 112 Ill. 656; *Thompson v. Force*, 65 Ill. 370; *Burnap v. Albert*, Taney, 244; *Mowry v. Whipple*, 8 R. I. 360.

to proceed, the presumption of fact will be almost conclusive that there was no malice.¹ But he must continue this upright course, and the advice will not protect him against facts afterward coming to his knowledge negating the guilt of the one prosecuted.² Nor will it protect him if not reasonably diligent in ascertaining the facts,³ or if he withheld important facts,⁴ or otherwise stated them incorrectly,⁵ or especially if he wilfully misrepresented them, when the effect of the evidence may be even highly inculpatory.⁶ The advice of one not learned in the law⁷ — as, a pettifogger,⁸ or one not in good professional standing,⁹ or a non-professional magistrate¹⁰ — will be of no avail. And if, acting under advice however sheltering him *prima facie*, he still lacked good faith, and did not believe the person guilty, he is chargeable with malice.¹¹

§ 237. **Other Facts** — tending to prove or negative malice have, in considerable numbers, been passed upon by the courts; but the foregoing sufficiently illustrate the nature of this element in malicious prosecution, and the present is not a work on the law of evidence.

III. *The Want of Probable Cause.*

§ 238. **General.** — We have already seen that there is no malicious prosecution where there is probable cause for it.¹² Now, —

¹ *Stanton v. Hart*, 27 Mich. 539; *Skidmore v. Bricker*, 77 Ill. 164; *Murphy v. Larson*, 77 Ill. 172; *Wright v. Hanna*, 98 Ind. 217; *Smith v. Austin*, 49 Mich. 286; *Wicker v. Hotchkiss*, 62 Ill. 107; *Ravenga v. Mackintosh*, 2 B. & C. 693, 697; *Anderson v. Friend*, 71 Ill. 475; *Collins v. Hayte*, 50 Ill. 337; *Davie v. Wisher*, 72 Ill. 262; *Burris v. North*, 64 Mo. 426.

² *Cole v. Curtis*, 16 Minn. 182.

³ *Ash v. Marlow*, 20 Ohio, 119.

⁴ *Logan v. Maytag*, 57 Iowa, 107; *Sharpe v. Johnston*, 59 Mo. 557; *Roy v. Goings*, 112 Ill. 656.

⁵ *Block v. Meyers*, 33 La. An. 776; *Decoux v. Lieux*, 33 La. An. 392; *Hewlett v. Cruchley*, 5 Taunt. 277.

⁶ *Wild v. Odell*, 56 Cal. 136.

⁷ *Olmstead v. Partridge*, 16 Gray, 381.

⁸ *Stanton v. Hart*, 27 Mich. 539.

⁹ *Roy v. Goings*, 112 Ill. 656.

¹⁰ *Straus v. Young*, 36 Md. 246.

¹¹ *Ravenga v. Mackintosh*, 2 B. & C. 693, 698; *Krulevitz v. Eastern Rld.* 143 Mass. 228. See *Ramsey v. Arrott*, 64 Texas, 320; *Decoux v. Lieux*, 33 La. An. 392.

¹² *Ante*, § 225.

§ 239. **Defined.** — Probable cause — or, as the expression oftener is, reasonable and probable cause — is any such combination of facts and proofs as may fairly lead the reasonable¹ mind to the belief (and the person relying on it must believe²) that, in the absence of hitherto unknown³ qualifying or rebutting evidence, the prosecution or other suit ought to be successful.⁴

§ 240. **Court or Jury.** — Plainly in principle, and equally on the authorities, the question whether or not particular facts constitute probable cause must be dealt with by the judge, and the jury alone can find whether or not they exist. In the words of Lord Denman, C. J.: "The jury are to ascertain

¹ Some employ the word "cautious," in this sort of connection, instead of reasonable. The latter is the more common, and, looking at the question broadly, I think it more accurately expresses the adjudged law.

² *Krulevitz v. Eastern Rld.* 140 Mass. 573, 575; *Good v. French*, 115 Mass. 201, 203; *Abrath v. Northeastern Ry.* 11 Ap. Cas. 247, affirming 11 Q. B. D. 440; *Haddrick v. Heslop*, 12 Q. B. 267, 274; *Turner v. Ambler*, 10 Q. B. 252, 260.

³ *Fagnan v. Knox*, 66 N. Y. 525, 528; *James v. Phelps*, 11 A. & E. 483, 488, 489.

⁴ *Gallaway v. Burr*, 32 Mich. 332; *Spalding v. Lowe*, 56 Mich. 366; *Lacy v. Mitchell*, 23 Ind. 67; *Wheeler v. Nesbitt*, 24 How. U. S. 544; *Hays v. Blizzard*, 30 Ind. 457; *Mowry v. Whipple*, 8 R. I. 360; *Shaul v. Brown*, 28 Iowa, 37; *Shafer v. Loucks*, 58 Barb. 426; *Casey v. Sevaton*, 30 Minn. 516; *Burton v. St. Paul, &c. Ry.* 33 Minn. 189; *Carl v. Ayers*, 53 N. Y. 14, 17; *Ames v. Snider*, 69 Ill. 376; *Cooper v. Utterbach*, 37 Md. 282; *Stansbury v. Fogle*, 37 Md. 369; *Bourne v. Stont*, 62 Ill. 261; *Cole v. Curtis*, 16 Minn. 182; *Parli v. Reed*, 30 Kan. 534. In *Ash v. Marlow*, 20 Ohio, 119, 129, the court approves the definition in *Munns v. Dupont*, 3 Wash. C. C. 31; namely,

that probable cause is "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves, to warrant a cautious man in the belief that the person accused is guilty of the offence with which he is charged." To the like effect, *Davie v. Wisher*, 72 Ill. 262; *Landa v. Obert*, 45 Texas, 539. "Probable cause is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person arrested is guilty." *Shaw, C. J.* in *Bacon v. Towne*, 4 Cush. 217, 238, 239. "Anything which will create in the mind of a reasonable man the belief that a felony existed, and that the party charged was in any way concerned in it, is probable cause." *O'Neill, C. J.* in *Braveboy v. Cockfield*, 2 McM. 270, 274. "I should define reasonable and probable cause to be an honest belief in the guilt of the accused, based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed." *Hawkins, J.* in *Hicks v. Faulkner*, 8 Q. B. D. 167, 171.

certain facts, and the judge is to decide whether those facts amount to such cause.”¹ With less precision, the question of probable cause is sometimes said to be a mixed one of law and fact.² And practically, where the facts are numerous and the evidence is contradictory or uncertain, all will be submitted together to the jury, who, “under the judge’s direction as to what facts will suffice for that purpose, will find affirmatively the non-existence of probable cause; and they have no right to assume it without proof.”³ Where the facts are undisputed, the judge is to determine their effect, as constituting probable cause or not.⁴ The following are some —

§ 241. **Illustrative Facts.** — One’s mere belief that another is guilty is not probable cause to prosecute him.⁵ The apparently truthful statement of even a young person, who claims to have witnessed the commission of the offence, will suffice if believed;⁶ but if the witness was a discharged convict, and there were accompanying evidences of malice, the conclusion will be the other way.⁷ Where the one knows that the other has committed an act of apparently malicious mischief, yet knows also that it was done under a claim of right, there is not probable cause.⁸ And a trespass to personal property is not necessarily larceny,⁹ or false swearing in a cause perjury,¹⁰ the knowledge whereof will constitute

¹ *Turner v. Ambler*, 10 Q. B. 252, 260; *Johnstone v. Sutton*, 1 T. R. 510, 545; *Pennsylvania Co. v. Weddle*, 100 Ind. 138; *Burton v. St. Paul, &c. Ry.* 33 Minn. 189; *Eastin v. Stockton Bank*, 66 Cal. 123; *Fulton v. Onesti*, 66 Cal. 575; *Hinton v. Heather*, 14 M. & W. 131, 134.

² *Johnstone v. Sutton*, *supra*; *Johnson v. Miller*, 63 Iowa, 529.

³ *Hawkins*, J. in *Hicks v. Faulkner*, 8 Q. B. D. 167, 170; *Cole v. Curtis*, 16 Minn. 182; *Driggs v. Barton*, 44 Vt. 124; *Caldwell v. Bennett*, 22 S. C. 1; *Weaver v. Townsend*, 14 Wend. 192; *Panton v. Williams*, 2 Q. B. 169; *Rowlands v. Samuel*, 11 Q. B. 39; *Abrath v. Northeastern Ry.* 11 Ap. Cas. 247, 11 Q. B. D. 440.

⁴ *James v. Phelps*, 11 A. & E. 483; *Kidder v. Parkhurst*, 3 Allen, 393; *Cloon v. Gerry*, 13 Gray, 201; *Davis v. Hardy*, 6 B. & C. 225; *Blachford v. Dod*, 2 B. & Ad. 179; *Stone v. Crocker*, 24 Pick. 81, 85; *Good v. French*, 115 Mass. 201; *Medcalfe v. Brooklyn, &c. Ins. Co.* 45 Md. 198.

⁵ *Farnam v. Feeley*, 56 N. Y. 451; *Graeter v. Williams*, 55 Ind. 461.

⁶ *Dwain v. Descalso*, 66 Cal. 415; *Chatfield v. Comerford*, 4 Fost. & F. 1008.

⁷ *Chapman v. Dunn*, 56 Mich. 31.

⁸ *James v. Phelps*, 11 A. & E. 483.

⁹ *Turner v. O’Brien*, 5 Neb. 542; *Wanser v. Wyckoff*, 9 Hun, 178.

¹⁰ *Plath v. Braunsdorff*, 40 Wis. 107.

probable cause for a criminal prosecution. The illustrations are innumerable.¹

§ 242. **Evidence.**—Not all the cases present, like those just stated, admitted or proven facts, which the court will hold to constitute alone probable cause or not. Malice, though an essential part of every case, is not of itself want of probable cause, neither is the jury justified in accepting it as adequate proof thereof.² After an unreversed conviction, this suit cannot in matter of law be maintained.³ A reversal of the conviction on appeal,⁴ a holding for trial by a magistrate,⁵ a disagreement of the jury,⁶ and other like things⁷ will be accepted as evidence of probable cause more or less weighty according to the circumstances.⁸ An acquittal or nonsuit does not show that there was no probable cause,⁹ which is a thing quite independent of actual guilt.¹⁰

IV. *In what Cases.*

§ 243. **General.**—An instigation of any criminal prosecution,¹¹ the procuring of one's arrest, whether on summary pro-

¹ See, for example, *Taylor v. Rice*, 27 Fed. Rep. 264; *Dennis v. Ryan*, 63 Barb. 145; *Merkle v. Otteusmeyer*, 50 Mo. 49; *Thelin v. Dorsey*, 59 Md. 539; *Bailey v. Dodge*, 28 Kan. 72; *Barrett v. Spaid*, 70 Ill. 408; *Spear v. Hiles*, 67 Wis. 361; *Bauer v. Clay*, 8 Kan. 580; *Chapman v. Cawrey*, 50 Ill. 512; *Butchers Union Slaughter-house, &c. Co. v. Crescent City Live Stock, &c. Co.* 37 La. An. 874; *Dorendinger v. Tschechtelin*, 12 Daly, 34; *Montross v. Bradsby*, 68 Ill. 185; *Sherwood v. Reed*, 35 Conn. 450.

² *Ames v. Snider*, 69 Ill. 376; *Leyenberger v. Paul*, 12 Bradw. 635; *Murray v. Long*, 1 Wend. 140; *Pangburn v. Bull*, 1 Wend. 345; *Casperson v. Sproule*, 39 Mo. 39; *Hall v. Hawkins*, 5 Humph. 357; *Horn v. Boon*, 3 Strob. 307; *Bell v. Percy*, 5 Ire. 83; *Sutton v. Johnstone*, 1 T. R. 493, 545; *Besson v. Southard*, 6 Selden, 236; *Wheeler v. Nesbitt*, 24 How. U. S. 544, 551; *Jordan v. Alabama Great Southern Rld.* 81 Ala. 220.

³ Ante, § 229. Compare, and query, *Olson v. Neal*, 63 Iowa, 214. And see *Bitting v. Ten Eyck*, 82 Ind. 421.

⁴ *Whitney v. Peckham*, 15 Mass. 243; *Dennehey v. Woodsum*, 100 Mass. 195, 198. See *Burt v. Place*, 4 Wend. 591.

⁵ *Bacon v. Towne*, 4 Cush. 217.

⁶ *Johnson v. Miller*, 63 Iowa, 529.

⁷ *Burhans v. Sanford*, 19 Wend. 417; *Johnston v. Martin*, 3 Murph. 248; *Ganea v. Southern Pac. Rld.* 51 Cal. 140.

⁸ *Labar v. Crane*, 49 Mich. 561; *Scott v. Simpson*, 1 Sandf. 601; *Bell v. Percy*, 11 Ire. 233; *Stewart v. Sonneborn*, 98 U. S. 187; *Peck v. Chouteau*, 91 Mo. 138; *Motes v. Bates*, 80 Ala. 382.

⁹ *Bitting v. Ten Eyck*, 82 Ind. 421; *Sinclair v. Eldred*, 4 Taunt. 7; *Adams v. Lisher*, 3 Blackf. 445; *McBean v. Ritchie*, 18 Ill. 114; *Thorpe v. Balliett*, 25 Ill. 339; *Burhans v. Sanford*, 19 Wend. 417.

¹⁰ *Lytton v. Baird*, 95 Ind. 349.

¹¹ *Jones v. Gwynn*, 10 Mod. 148;

cess or in a plenary suit civil or criminal,¹ or of his expulsion from premises which he holds as tenant under a landlord,² or the attachment or other seizure of his goods,³ or the suing out and enforcement of an injunction,⁴—each of these, if done maliciously and without probable cause, is good foundation for the action we are considering. As expressed by Lord Campbell, C. J., “to put into force the process of the law maliciously and without any reasonable or probable cause is wrongful; and, if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action on the case.”⁵ This is the entire principle, recognized alike in England and all of our States. There is some difference in its application, particularly as to a—

§ 244. **Civil Suit followed by Costs.**—In a civil suit of a sort involving no defamation,⁶ no arrest, no attachment of goods, and no other injury outside of the sphere of the costs which the defendant recovers of the plaintiff, the English doctrine is that the prevailing defendant has been fully indemnified by the costs, so that he has suffered nothing, consequently that he cannot maintain this action.⁷ For in England “extra costs—that is, costs beyond those awarded by the court to a successful defendant—are not recognized by law.”⁸ Some of our American courts take the same view of costs;⁹ and they hold, with the English, that an action for malicious prosecution cannot be maintained in this sort of case.¹⁰ Others of

Reed v. Taylor, 4 Taunt. 616; Anonymous, 2 Mod. 306, and editor's note; Savil v. Roberts, 1 Salk. 13.

¹ Churchill v. Siggers, 3 Ellis & B. 929; De Medina v. Grove, 10 Q. B. 152, 169; Steer v. Scoble, Cro. Jac. 667; Casebeer v. Rice, 18 Neb. 203.

² Block v. Bonnet, 28 La. An. 540.

³ Savage v. Brewer, 16 Pick. 453; Redway v. McAndrew, Law Rep. 9 Q. B. 74; Fen v. Driver, 1 Keb. 515.

⁴ Newark Coal Co. v. Upson, 40 Ohio State, 17; Cox v. Taylor, 10 B. Monr. 17. But see Gorton v. Brown, 27 Ill. 489.

⁵ Churchill v. Siggers, supra, at p. 937.

⁶ Ante, § 222.

⁷ Cotterell v. Jones, 11 C. B. 713, 16 Jur. 88.

⁸ Maule, J. in Cotterell v. Jones, supra, Jur. p. 90; Sinclair v. Eldred, 4 Taunt. 7; Webber v. Nicholas, Ryan & Moody, N. P. 419, 4 Bing. 16.

⁹ Young v. Courtney, 13 La. An. 193.

¹⁰ Muldoon v. Rickey, 7 Out. Pa. 110; Wetmore v. Mellinger, 64 Iowa, 741, confirmed in Smith v. Hintrager, 67 Iowa, 109. In the former of these two Iowa cases, the court deemed this

our courts deem it to be, in the words of Morris, C., speaking for the Indiana court, "too clear for discussion that the costs which the law gives a successful party are no adequate compensation for the time, trouble, and expense of defending a malicious and groundless civil action. The party sued must devote some time to the defence of the suit; he must look up his evidence and employ counsel. This waste of time and necessary expenditure of money, by its results, affects the property of the defendant. For these expenses the costs recovered in the action are no compensation at all. In some of the States reasonable attorney fees for the successful party are included in the taxable costs. It is not so here. No good and sufficient reason can be given why he who has maliciously

doctrine "established by the great preponderance of authority," — a less weighty argument than if they had said that it was sustained by the preponderance of legal reason. Some of the authorities they cite are *Mayer v. Walter*, 14 Smith, Pa. 283; *Kramer v. Stock*, 10 Watts, 115; *The State v. Meyer*, 11 Vroom, 252; *Eberly v. Rupp*, 9 Norris, Pa. 259; *Gorton v. Brown*, 27 Ill. 489; *Woodmansie v. Logan*, 1 Penning. 93; *Parker v. Frambes*, 1 Penning. 156; *Potts v. Imlay*, 1 Southard, 330. In Georgia, what the court deems to be the common-law doctrine is followed; namely, that, where the civil suit resulted in costs to the defendant, malicious prosecution cannot be maintained unless special damages are shown. Blandford, J. has stated the reason thus: "In England, before the statute of 52 Hen. 3, 1277, it was the practice constantly to hold that, where one sued another maliciously and without probable cause, he was liable to such person in damages upon an action on the case, but since the passage of that statute, which gives costs to the defendant *per falsum clamorem*, the bringing of a civil suit maliciously and without probable cause was not a ground upon which an action could be maintained. Yet there was this distinction: when an action was sued out maliciously and

without probable cause, whereby the person of the defendant was arrested, or his property attached, or any special grievance to defendant, then in such a case the action would lie, and, as we understand, that was the common law when this State was a province, and when our adopting statute was passed in 1784, and would have been the law without this statute. There is a case which states this doctrine clearly and explicitly. In *Savil v. Roberts*, 1 Salk. 13, a decision by Lord Holt, which is declaratory of the common law, in which it is stated that, since the passage of the act allowing costs to defendants where plaintiffs are nonsuit or fail to recover, an action for maliciously suing out an action cannot be maintained. Yet before this statute such actions were constantly brought and maintained; but, since the passage of the act, in order to maintain the action it must be shown that the defendant maliciously sues the plaintiff either with intent to imprison him or do him some special prejudice; then an action on the case lies, and the grievance must be set out specially. We take this to be the common law, and as there is no statute changing this law, it is of force in this State." *Mitchell v. Southwestern Rld.* 75 Ga. 398, 404, 405.

and without probable cause instituted a suit against another should not be required to pay the party so sued such sum as will make him entirely whole. And so a majority of the decided cases in this country hold.”¹

§ 245. **Damages not recouped by Costs.** — One who has been maliciously prosecuted civilly, the same as one prosecuted criminally, is, by all opinions, English and American, entitled to recover in this action compensation for what he has suffered outside of the return to which he was entitled in the costs.² An instance is that of defamation, already spoken of.³ Another, is any proceeding calculated to injure one's business credit.⁴ And where there has been a malicious arrest, it has been ruled even in England that the injured party may recover in the malicious prosecution suit, beyond the taxed costs, his costs as between attorney and client. The general doctrine as held in England being pressed upon Lord Ellenborough, he replied: “If by your act you subject a party to a legal liability

¹ *McCardle v. McGinley*, 86 Ind. 538, 540, 541, referring to *Lockenour v. Sides*, 57 Ind. 360; *Closson v. Staples*, 42 Vt. 209; *Whipple v. Fuller*, 11 Conn. 582; *Marbourg v. Smith*, 11 Kan. 554; *Burnap v. Albert*, Taney, 244; *Cox v. Taylor*, 10 B. Monr. 17.

² *Waterer v. Freeman*, Hob. 266 a; *Pangburn v. Bull*, 1 Wend. 345; *Baron v. Sleigh*, Cro. Eliz. 628, 629; *Spaids v. Barrett*, 57 Ill. 289; *Bird v. Line*, 1 Comyns, 190; *False Affidavits*, 12 Co. 128; *Gray v. Degge*, T. Jones, 132; *Barnett v. Reed*, 1 Smith, Pa. 190; *Chapman v. Pickersgill*, 2 Wils. 145; *Johnson v. King*, 64 Texas, 226; *Streeper v. Ferris*, 64 Texas, 12.

³ Ante, § 222.

⁴ *Quartz Hill Gold Mining Co. v. Eyre*, 11 Q. B. D. 674. Brett, M. R. said in this case: “When we look back to the decisions of the judges of earlier times (which decisions are to my mind the best guides for judges of the present day), we find it laid down by Holt, C. J., in *Savill v. Roberts*, 1 Ld. Raym. 374, that there are three heads of damage which will support an action for

malicious prosecution. There is damage to a man's person, as when he is taken into custody, whether that be, as in former times, upon mesne process or upon final process, or whether it be upon a criminal charge. To take away a man's liberty is damage, of which the law will take notice. Secondly, to cause a man to be put to expense is damage, of which the law will take notice. But Holt, C. J., adds a third head of damage, and that is where a man's fair fame and credit are injured. . . . That seems to be the ground upon which Cleasby, B., supported the action in *Johnson v. Emerson*, Law Rep. 6 Ex. 329, at p. 340, and I think that his view was right. By proceedings in bankruptcy a man's fair fame is injured just as much since the Bankruptcy Act, 1869, as it was before, because he is openly charged with insolvency before he can defend himself. It is not like an action charging a merchant with fraud, where the evil done by bringing the action is remedied at the same time that the mischief is published, namely, at the trial.” p. 683-685.

to pay a sum to another, you must indemnify him against such expenses; if it were otherwise, it would come to this, that an attorney would not maintain an action against his client for the extra costs."¹ It is submitted that this is the true rule, which should be followed as well in the cases mentioned in the last section as in these. Exemplary damages are in some circumstances given in a malicious-prosecution suit;² but, where they are not, if the plaintiff has already received in costs his entire actual damages, he cannot ask to have them paid a second time, yet he can justly claim reimbursement for whatever he has not thus received.

V. *After what Steps.*

§ 246. **Concurrent Proceedings.** — It is the wise policy of the law to prohibit parties from litigating the same thing at the same time through two separate proceedings. There are numerous illustrations of this, and one of them appears in our present topic. We have seen³ that, if a person prosecuted is irrevocably beaten, there remains to him no right to complain of the prosecution. Therefore, if, while a cause is depending, and the result of it is uncertain, the law permitted the defendant to bring a suit against the plaintiff or prosecutor, the courts would be required to entertain two simultaneous proceedings to settle one and the same issue. Hence, —

§ 247. **Doctrine defined.** — A suit for malicious prosecution can be brought only after the proceeding complained of is terminated past revival.⁴ To illustrate, —

§ 248. **Conditional Striking from Docket — Nolle Prosequi.** — If, on motion of the State's attorney, a criminal cause is stricken from the docket, with leave to reinstate it, the de-

¹ Sandback v. Thomas, 1 Stark. 306, 307. s. p. by Lord Abinger in Gould v. Barratt, 2 Moody & R. 171.

² Ziegler v. Powell, 54 Ind. 173.

³ Ante, § 229, 242.

⁴ Casebeer v. Rice, 18 Neb. 203; Severance v. Judkins, 73 Maine, 376, 378; Morgan v. Hughes, 2 T. R. 225; Gorrell v. Snow, 31 Ind. 215; Brown v.

Randall, 36 Conn. 56; O'Brien v. Barry, 106 Mass. 300; Lowe v. Wartman, 18 Vroom, 413; Basebe v. Matthews, Law Rep. 2 C. P. 684; Casebeer v. Drahoble, 13 Neb. 465; Fisher v. Bristow, 1 Doug. 215; Castrique v. Behrens, 3 Ellis & E. 709; Wood v. Laycock, 3 Met. Ky. 192; Smith v. Shackelford, 1 Nott & McC. 36; Pratt v. Page, 18 Wis. 337.

fendant is not discharged from the indictment, and a suit for malicious prosecution will be premature.¹ But a *nolle prosequi* ends the indictment past recall,² and thereupon the right to a malicious-prosecution suit is perfected,³ — a proposition from which a few of our courts, misapprehending the effect of a *nolle prosequi*,⁴ have dissented, making distinctions not necessary to be particularly pointed out here.⁵

§ 249. **Other Forms of Termination.** — The methods of ending the proceeding are numerous, and they need not be all specified. It is sufficient, for example, if the indictment is quashed and the prisoner discharged by judgment of the court.⁶ Only the particular proceeding need be at an end, it being immaterial that the party is subject to a new one.⁷ A criminal prosecution, said a learned judge, is “terminated, 1, where there is a verdict of not guilty; 2, where the grand jury ignore a bill; 3, where a *nolle prosequi* is entered; and, 4, where the accused has been discharged from bail or imprisonment.” Therefore the court held that a prosecution was not ended while pending before the grand jury.⁸ A discharge by the examining magistrate will suffice.⁹ In the nature of some proceedings the defendant has nothing to do, and whenever the plaintiff’s steps are finished, the right to the malicious-prosecution suit is complete; “as,” it was judicially observed, “where the plaintiff was committed on articles of peace for a definite term unless he should find sureties for the peace. In such a case the plaintiff is allowed, *ex necessitate rei*, to main-

¹ Blalock v. Randall, 76 Ill. 224. And see Bacon v. Waters, 2 Allen, 400.

² 1 Bishop Crim. Proc. § 1395.

³ Appgar v. Woolston, 14 Vroom, 57; Lowe v. Wartman, 18 Vroom, 413; Chapman v. Woods, 6 Blackf. 504; Stanton v. Hart, 27 Mich. 539.

⁴ Explained in 1 Bishop Crim. Proc. § 1395 and note. Consult also Moulton v. Beecher, 8 Hun, 100, 1 Abb. N. Cas. 193; Kennedy v. Holladay, 25 Mo. Ap. 503. “It seems to us very clear that the rule as stated by Mr. Bishop and the judges in the cases above cited must be the true rule, when

the *nolle prosequi* is entered upon an indictment for any cause.” Taylor, J. in Woodworth v. Mills, 61 Wis. 44, 52.

⁵ Brown v. Lakeman, 12 Cush. 482; Parker v. Farley, 10 Cush. 279; Graves v. Dawson, 133 Mass. 419; Graves v. Dawson, 130 Mass. 78; Langford v. Boston, &c. Rld. 144 Mass. 431; Garing v. Fraser, 76 Maine, 37.

⁶ Hays v. Blizzard, 30 Ind. 457.

⁷ Appgar v. Woolston, 14 Vroom, 57.

⁸ Lowe v. Wartman, 18 Vroom, 413, 414, Parker, J.

⁹ Costello v. Knight, 4 Mackey, 65; Moyle v. Drake, 141 Mass. 238.

tain his action, though he was discharged by the effluxion of the time for which he was committed, for the reason that he is not at liberty to controvert the statement of the defendants in making the complaint, and therefore could not have a hearing and obtain a favorable decision.”¹ A release on giving surety to keep the peace is a sufficient ending of the proceeding.²

§ 250. *The Doctrine of this Chapter restated.*

One who, having no reasonable or probable cause to set in motion the law's processes against another, does it to promote some indirect or sinister end, — termed, in legal language, doing it maliciously, — and thereby inflicts some legal injury on the other, such as arresting his person, seizing his goods, or doing any other disturbance to his person or property, or maligning him, or impairing his business standing, or subjecting him to the labor and expense of a defence beyond what he may have back in taxable costs, commits a civil wrong for which the party injured is entitled to redress in what is termed a suit for malicious prosecution. If the proceeding against him was successful, he is estopped to assert that it was malicious and without probable cause. Therefore he cannot bring his action for redress until that proceeding is terminated. The details, having already been stated, need not be repeated.

¹ *Apgar v. Woolston*, 14 Vroom, 57, 65, Depue, J., referring to *Steward v. Gromett*, 7 C. B. N. s. 191; *Castrique*

v. Behrens, 3 Ellis & E. 709; *Basebe v. Matthews*, Law Rep. 2 C. P. 684.

² *Hyde v. Grench*, 62 Md. 577.

CHAPTER XVI.

SLANDER AND LIBEL.

- § 251. Introduction.
- 252-257. General Doctrine.
- 258-277. Oral Slander.
- 278-286. Written, or Libel.
- 287-310. The Justifications and Defences.
- 311. Doctrine of Chapter restated.

§ 251. **How Chapter divided.** — We shall consider, I. The General Doctrine; II. Oral Slander; III. Written Slander, or Libel; IV. The Justifications and Defences.

I. *The General Doctrine.*

§ 252. **What and why.** — The elucidations of the preceding chapters have brought fully to view the principles governing our present subject. A man who purposely, or even needlessly or recklessly, does what injures another in any legal interest, must compensate him therefor. But a like harm, casually following one's lawful pursuit of his business, or the discharge of his legal or social duties, neither carelessly inflicted nor the outcome of any evil purpose, falls upon the other as a common accident of life, for which there is no compensation.¹ Hence —

§ 253. **Doctrine defined.** — He who, not in pursuance of any interest of his own, and neither in obedience to the law nor in the discharge of any public or private duty, so employs any words or signs as to injure another in a way and degree cognizable by the law, is liable to him in damages. As to the —

¹ See the series of chapters, ante, § 97-185.

§ 254. **Nature of Injury** — (Actionable or not *Per Se*). — The injury by words, for which the law gives compensation, may be judicially discernible as the natural or necessary consequence of the words themselves, in which case they are said to be actionable *per se*, or it may appear only on allegation and proof.¹ Waiving now the manner of showing it, such injury may be any pecuniary loss, as of money, business, or estate;² any deprivation of personal liberty, or the endangering of it, as by a criminal prosecution;³ anything excluding one from social life, or tending to his being avoided by society;⁴ in some circumstances, mental suffering;⁵ any loss of professional reputation, presumably calculated to impair the ability to obtain money,⁶ — these and their affinities are severally legal damages, the bringing whereof upon one by words or signs is a wrong which the law will redress, when of a magnitude⁷ justifying its interference.

§ 255. **Written or Spoken**. — Both oral words and written are, in the requisite circumstances, actionable. But the law deems writing a heavier form of defamation than mere speech, so that some defamatory words are actionable when written but not when orally uttered.⁸ An attempt here to define the

¹ Post, § 275; *Studdard v. Trucks*, 31 Ark. 726; *Sterling v. Jugenheimer*, 69 Iowa, 210; *Carroll v. White*, 33 Barb. 615; *Griffin v. Moore*, 43 Md. 246; *Rock v. McClarnon*, 95 Ind. 415; *Rea v. Harrington*, 58 Vt. 181; *Shelby v. Sun Printing, &c. Assoc.* 38 Hun, 474.

² Ante, § 243; *Bergmann v. Jones*, 94 N. Y. 51; *Gott v. Pulsifer*, 122 Mass. 235; *Hovey v. Rubber Tip Pencil Co.* 57 N. Y. 119, 125.

³ Ante, § 243; *Mitchell v. Milholand*, 106 Ill. 175; *Rea v. Harrington*, 58 Vt. 181; *Brooker v. Coffin*, 5 Johns. 188.

⁴ *Carslake v. Mapledoram*, 2 T. R. 473, 475; *Moore v. Meagher*, 1 Taunt. 39; *Taylor v. Hall*, 2 Stra. 1189; *Davies v. Solomon*, Law Rep. 7 Q. B. 112.

⁵ *Rea v. Harrington*, 58 Vt. 181; *Chesley v. Thompson*, 137 Mass. 136; *Doullut v. McManus*, 37 La. An. 800;

Mahoney v. Belford, 132 Mass. 393; *Wolf v. Trinkle*, 103 Ind. 355. Some are inclined to pay but slight regard to mental suffering. See, for example, *Beach v. Ranney*, 2 Hill, N. Y. 309, 314; *Terwilliger v. Wands*, 17 N. Y. 54, 63. It is difficult to assign a sound reason for extending a less protection to the mind than to the body, though such reasoning has often been attempted. And see 1 Bishop Mar. & Div. § 722-733 b.

⁶ *Dixon v. Holden*, Law Rep. 7 Eq. 488; *Ayre v. Craven*, 2 A. & E. 2; *Hartley v. Herring*, 8 T. R. 130; *Goodenow v. Tappan*, 1 Ohio, 60.

⁷ Ante, § 35, 36.

⁸ *Whitney v. Janesville Gazette*, 5 Bis. 330; *Clement v. Chivis*, 9 B. & C. 172; *Thorley v. Kerry*, 4 Taunt. 355; *Leicester v. Walter*, 3 Camp. 214, note; *Miller v. Butler*, 6 Cush. 71, 75; Com-

distinction by exact lines could hardly be successful. Instead of which, the two sorts of defamation will be considered in separate sub-titles, and the bounds of each will be given upon its own particular ground.

§ 256. **The Defences** — are the same in oral and written defamation. Therefore they will be considered together in our fourth sub-title. One matter extending through the law of the entire subject is in our books expressed by the word —

§ 257. **Malice**. — A slander, whether written or oral, must, to be actionable, be what the law terms malicious; so, or by something equivalent, charged in the allegation.¹ But where the words are actionable *per se*,² a sort of imputed malice, called malice in law, is all that is required in the proof. There need be no ill will to the person slandered, or purpose to injure him;³ but, in the law of slander and libel, the term “malice,” when not qualified by any such word as “express” or “in fact,” denotes simply that the act was voluntary and without legal excuse. And where there is neither the express nor the imputed malice, there is no actionable wrong.⁴ Further explanations will appear in our fourth sub-title.⁵

monwealth v. Child, 13 Pick. 198, 202. I remember listening to an educated man, not a lawyer, who was defending himself before a court and jury on an indictment for libel. He claimed that the evil of defamatory words lies in their oral utterance, and that good rather than harm follows from printing them. He quoted Job's exclamation, “Oh that mine adversary had written a book!” meaning, he said, that if the adversary had written the slander Job could have met and overturned it, when he could not do the same thing with oral words; which could not be caught and held. But plainly, on this view, there was an actionable wrong; since it would have required Job's valuable time and intellectual exertions, probably his money also, to meet and refute the slander. And he who maliciously compels this should foot the bill.

¹ 1. Saund. Wms. ed. 242 a, note; *Hanning v. Bassett*, 12 Bush, 361;

King v. Root, 4 Wend. 113; *White v. Nicholls*, 3 How. U. S. 266, 284.

² Ante, § 254.

³ Ante, § 142-147, 231-287.

⁴ *Branstetter v. Dorrough*, 81 Ind. 527, 530; *Whittemore v. Weiss*, 33 Mich. 348; *Williams v. Gordon*, 11 Bush, 693; *Whitney v. Janesville Gazette*, 5 Bis. 330; *Finch v. Finch*, 21 S. C. 342; *Zuckerman v. Sonnenschein*, 62 Ill. 115; *Mitchell v. Milholland*, 106 Ill. 175; *Gott v. Pulsifer*, 122 Mass. 235; *Maclean v. Scripps*, 52 Mich. 214; *Shipp v. Story*, 68 Ga. 47; *Hovey v. Rubber Tip Pencil Co.* 57 N. Y. 119, 125; *Marks v. Baker*, 28 Minn. 162; *Horne v. Marshall*, 5 Munf. 466; *Lester v. Thurmond*, 51 Ga. 118; *Wozelka v. Hettrick*, 93 N. C. 10; *Bryant v. Jackson*, 6 Humph. 199; *Gates v. Meredith*, 7 Ind. 440; *Emmens v. Pottle*, 16 Q. B. D. 354; *Bromage v. Prosser*, 4 B. & C. 247, 255.

⁵ Post, § 306.

II. *Oral Slander.*

§ 258. **Compared with Written — (Magnitude).** — From the doctrine that, for any combination of wrong and injury to be actionable it must have reached a standard in magnitude justifying the law's interference,¹ blended with the doctrine that oral words are less injurious than written, we have already derived the conclusion that a higher degree of evil must mingle with the oral than with the written to move the courts to give redress therefor.² Thus, —

§ 259. **Contempt and Ridicule.** — Words simply tending to bring a person in the common walks of life into contempt and ridicule may be actionable if written,³ but they are not so when uttered orally.⁴ Now, —

§ 260. **Technical.** — In the nature of things, there can be no rule of reason, exact and certain in its application, to determine whether or not particular words in given circumstances carry enough of evil to justify the interference of the law. Were the question new, and to be judicially decided for the first time, judges would differ, and no one could predict with exactness where a particular bench of judges would draw the line. Or, were it first legislatively passed upon, no body of law-makers could enact a rule in the practical interpretation whereof all judges would agree. But the courts of the past times, being required to decide multitudes of questions, have reached conclusions out of which it has become not difficult to eliminate outlines of doctrine, in a considerable degree technical, yet serving the practical purposes of justice. Thus, —

§ 261. **Defined.** — Oral slander is one's malicious⁵ uttering of words distinctly importing that another is guilty of some

¹ Ante, § 35, 36.

² Ante, § 255.

³ Post, § 285.

⁴ Colby v. Reynolda, 6 Vt. 489 ;
Onslow v. Horne, 3 Wils. 177, 186,
187 ; Filber v. Dautermann, 28 Wis.
134 ; Nelson v. Borchenius, 52 Ill. 236 ;

Anonymous, 60 N. Y. 262 ; Steele v.
Southwick, 9 Johns. 214 ; Cooper v.
Greeley, 1 Denio, 347, 362.

⁵ Ante, § 257 ; Williams v. Gordon,
11 Bush, 693 ; Belck v. Belck, 97 Ind.
73 ; Burton v. Beasley, 88 Ind. 401.

indictable offence (either in its nature odious, or subject to an infamous or odious punishment);¹ or that he has some contagious disease, of a sort tending to exclude him from society; or, if spoken of him in reference to his business, profession, or calling, or of a public office which he holds, calculated to injure him therein; or, of whomsoever spoken, found, on special allegation and proofs, to have in fact subjected him to some personal or pecuniary damage.² More specifically, —

§ 262. *Accusation of Crime* : —

General. — Subject to very little if any qualification, it is the doctrine of all our courts that to charge one orally with either a common-law or statutory crime, punishable by indictment, is actionable. And as the criminal laws of our States somewhat differ, the rule in slander varies with them. But,

¹ Perhaps, as see post, § 266.

² There is a special difficulty in defining oral slander, growing out of the facts that the ancient and modern decisions do not absolutely harmonize, and particularly that the courts of our respective States differ in their conclusions upon some minor particulars. The United States Supreme Court, in *Pollard v. Lyon*, 91 U. S. 225, in an able opinion by Clifford, J. investigated the subject pretty carefully, and arrived at conclusions not greatly differing from the above. "Oral slander, as a cause of action," said the court, "may be divided into five classes, as follows : 1. Words falsely spoken of a person which impute to the party the commission of some criminal offence involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. 2. Words falsely spoken of a person which impute that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society. 3. Defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of in-

tegrity in the discharge of the duties of such an office or employment. 4. Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade. 5. Defamatory words falsely spoken of a person, which, though not in themselves actionable, occasion the party special damage." p. 226. Kent, 2 Com. 16, defines thus : "The injury consists in falsely and maliciously charging another with the commission of some public offence, criminal in itself, and indictable, and subjecting the party to an infamous punishment, or involving moral turpitude, or the breach of some public trust; or with any matter in relation to his particular trade or vocation, and which, if true, would render him unworthy of employment; or, lastly, with any other matter or thing by which special injury is sustained." He refers to *Brooker v. Coffin*, 5 Johns. 188, and *Van Ness v. Hamilton*, 19 Johns. 349, 367. I will add, among later cases, *McNamara v. Shannon*, 8 Bush, 557; *Zeliff v. Jennings*, 61 Texas, 458; *Kimms v. Stiles*, 44 Vt. 351; *Davis v. Brown*, 27 Ohio State, 326.

except as to be explained further on in this sub-title, no scandalous words not importing crime constitute slander.¹ For example, it is not actionable to charge one with having "swindled a man out of five hundred dollars," where this is not an indictable offence.² Descending more to particulars, —

§ 263. **Accusation of Criminal Purpose — (Future).** — Ordinarily to impute orally to a person the intent to commit a crime or any undeveloped criminal wickedness, or to predict that he will hereafter incur guilt, is not going far enough to constitute slander.³ Thus, the words "You will steal," or "I believe you will steal," unexplained, will not suffice.⁴

§ 264. **Doubtful Meaning.** — If the words are of doubtful meaning, and they do not fairly imply guilt, they are insufficient;⁵ as, "You burnt your buildings," which would be a crime or not according to the circumstances.⁶ So the words, "You took my money and have it," do not necessarily impute larceny, and unexplained they are not actionable.⁷ But they

¹ *Holt v. Scholefield*, 6 T. R. 691, 694; *Hutts v. Hutts*, 62 Ind. 214; *Spooner v. Keeler*, 51 N. Y. 527; *Kimnis v. Stiles*, 44 Vt. 351; *Seller v. Jenkins*, 97 Ind. 430; *Anonymous*, 60 N. Y. 262; *Haag v. Cooley*, 33 Kan. 387; *Klumph v. Dunn*, 16 Smith, Pa. 141; *Quigley v. McKee*, 12 Oregon, 22; *Webb v. Beavan*, 11 Q. B. D. 609; *Kinney v. Hosea*, 3 Harring. Del. 77; *Demarest v. Haring*, 6 Cow. 76; *Lukehart v. Ryerly*, 3 Smith, Pa. 418; *Wyant v. Smith*, 5 Blackf. 293; *Burton v. Burton*, 3 Greene, Iowa, 316; *Birch v. Benton*, 26 Mo. 153; *Speaker v. McKenzie*, 26 Mo. 255; *Tomlinson v. Brittlebank*, 4 B. & Ad. 630; *Davis v. Brown*, 27 Ohio State, 326. Orally to charge one with an offence purely military is not actionable. *Hollingsworth v. Shaw*, 19 Ohio State, 430. And where the wrong charged is a civil one, the particular form of it must be indictable; as, it is not actionable to accuse a witness of perjury in a trial before a magistrate who sat without jurisdiction, for false swearing in such a case is not

in law perjury. *Hamm v. Wickline*, 26 Ohio State, 81.

² *Weil v. Altenhofen*, 26 Wis. 708; *Filber v. Dautermann*, 28 Wis. 134; *Weil v. Schmidt*, 28 Wis. 137; *Lucas v. Flinn*, 35 Iowa, 9; *Pollock v. Hastings*, 88 Ind. 248; *Winter v. Sumvalt*, 3 Har. & J. 38; *Savile v. Jardine*, 2 H. Bl. 531.

³ *Eaton v. Allen*, 4 Co. 16 b; *Bland's Case*, Hut. 18; *Brittridge's Case*, 4 Co. 18 b; *McKee v. Ingalls*, 4 Scam. 30; *Wilson v. Tatum*, 8 Jones, N. C. 300; *K. v. H.* 20 Wis. 239; *Dickey v. Andros*, 32 Vt. 55; *Harrison v. Stratton*, 4 Esp. 218.

⁴ *Bays v. Hunt*, 60 Iowa, 251.

⁵ *Stitzell v. Reynolds*, 9 Smith, Pa. 488; *Steward v. Bishop*, Hob. 177; *Gaudy v. Smith*, 1 Lev. 250; *Robins v. Hildredon*, Cro. Jac. 65; *Barber's Case*, Sir F. Moore, 401; *Peterson v. Sentman*, 37 Md. 140; *Rock v. McClarnon*, 95 Ind. 415; *Casselman v. Winship*, 3 Dak. 292; *Emmerson v. Marvel*, 55 Ind. 265.

⁶ *Estes v. Estes*, 75 Maine, 478.

⁷ *Christal v. Craig*, 80 Mo. 367.

need not be technically accurate, like those required in an indictment; it is enough that they are presumably understood to charge crime.¹ For example, it is a slander to call one a "thief,"² an "abortionist,"³ or to say that he stole.⁴ But —

§ 265. *Interpreted together.* — All the words must be interpreted together and in connection with the surroundings.⁵ For example, "Thou art a thief, and hast stolen twenty loads of my furze," or my "trees,"⁶ are not slander in a locality where it is not larceny to purloin things which are parcel of the realty. And it is not such to charge one with a penitentiary offence, adding that he was insane when he did it.⁷

§ 266. *Nature of Crime.* — It is the English doctrine that the accusation of anything indictable suffices. It need not even specify a particular crime;⁸ as, "I will lock you up in Gloucester jail next week, I know enough to put you there," charged in the declaration to mean that the plaintiff had committed some criminal offence, was held on demurrer to be sufficient.⁹ On the other hand, in Pennsylvania, "in order to render words spoken of a private person actionable," said the learned judge, "they must impute, not only an indictable offence, but one of an infamous character, or subject to an infamous or disgraceful punishment." So that, though a statute had made the stealing of things attached to the freehold an indictable misdemeanor, an oral imputation of it was adjudged not to be slander; because the crime was of a sort

¹ *Stroebel v. Whitney*, 31 Minn. 384; 1; *Jackson v. Adams*, 2 Scott, 599, 2 Lafollett v. McCarthy, 18 Bradw. 87; Bing. N. C. 402.

² *Bihler v. Gockley*, 18 Bradw. 496; ⁶ *Clarke v. Gilbert*, Hob. 331 a; *Zimmerman v. McMakin*, 22 S. C. 372; *Coote v. Gilbert*, Hob. 77 b. And see *Wing v. Wing*, 66 Maine, 62.

Colman v. Godwin, 3 Doug. 90; *Carpenter v. Tarrant*, Cas. temp. Hardw. 339.

³ *Sabin v. Angell*, 46 Vt. 740; *Reynolds v. Ross*, 42 Ind. 387.

⁴ *De Pew v. Robinson*, 95 Ind. 109.

⁵ *Taylor v. Short*, 40 Ind. 506.

⁶ *Hall v. Adkins*, 59 Mo. 144; *Works v. Stevens*, 76 Ind. 181; *Taylor v. Short*, 40 Ind. 506; *Parmer v. Anderson*, 33 Ala. 78; *McCaleb v. Smith*, 22 Iowa, 242; *Brite v. Gill*, 2 T. B. Monr. 65; *Carter v. Andrews*, 16 Pick. 8; *Jenkinson v. Mayne*, 1 Cro. Eliz. 384; *Donne's Case*, 1 Cro. Eliz. 62; *Curtis v. Curtis*, 10 Bing. 477; *Francis v. Roose*, 3 M. & W. 191; *Fowler v. Dowdney*, 2 Moody & R. 119.

⁹ *Webb v. Beavan*, 11 Q. B. D. 609.

not rendering the person convicted of it infamous.¹ In our other American courts, we sometimes meet with words more or less corresponding to these Pennsylvania ones,² and sometimes more nearly affirming the English doctrine.³ But the actual adjudications conflicting with the English are few, and it would be difficult to find any solid reasons for multiplying them.⁴ Still, if the accusation was only of some minor offence, not *malum in se*, — such as the unlicensed selling of a glass of beer, punishable by a fine of twenty dollars, and collectible by indictment, — we may doubt whether an action for oral slander could be maintained thereon.⁵ We find illustrations of this subject in the frequent oral imputations of —

§ 267. **Adultery and Fornication.** — In States where these offences are indictable, it is commonly held to be an actionable slander to accuse a person of having committed one of them;⁶ as, to say of an unmarried woman that she is “a whore.”⁷ But where either remains, as at the common law, not punishable criminally, the oral imputation of it is not slander.⁸ Contrary to this, however, the Iowa court has, without any sort of statutory aid, declared it actionable to impute to any female a want of chastity, because manifestly hindering her

¹ Stitzell v. Reynolds, 17 Smith, Pa. 54, 57, Williams, J. referring to Dottarer v. Bushey, 4 Harris, Pa. 204; Gosling v. Morgan, 8 Casey, Pa. 273; Stitzell v. Reynolds, 9 Smith, Pa. 488.

² Howard v. Stephenson, 2 Mill, 408; Wright v. Paige, 36 Barb. 438; Young v. Miller, 3 Hill, N. Y. 21, 22; Smith v. Smith, 2 Sneed, 473; McNamara v. Shannon, 8 Bush, 557; Zelf v. Jennings, 61 Texas, 458.

³ Chaddock v. Briggs, 13 Mass. 248; Wiley v. Campbell, 5 T. B. Monr. 396; Bloss v. Tobey, 2 Pick. 320, 328, where Parker, C. J. states the “modern doctrine” to be, “that words spoken, to be actionable, must import in themselves a charge of some punishable offence, or an imputation of some disgraceful disease, or be spoken in relation to some trade or occupation in which the party slan-

dered is injured;” Johnson v. Shields, 1 Dutcher, 116.

⁴ Page v. Merwin, 54 Conn. 426.

⁵ And see Elliot v. Ailsberry, 2 Bibb, 473; Wagaman v. Byers, 17 Md. 183.

⁶ Miller v. Parish, 8 Pick. 384, 385; Symonds v. Carter, 32 N. H. 458; Reitan v. Goebel, 33 Minn. 151; Patterson v. Wilkinson, 55 Maine, 42; Page v. Merwin, 54 Conn. 426.

⁷ Mayer v. Schleichter, 29 Wis. 646.

⁸ Berry v. Carter, 4 Stew. & P. 387; Pollard v. Lyon, 91 U. S. 225; Dukes v. Clark, 2 Blackf. 20; Vanderlip v. Roe, 11 Harris, Pa. 82; Roberts v. Roberts, 5 B. & S. 384, 389; Wilby v. Elston, 8 C. B. 142; Griffin v. Moore, 43 Md. 246. **Keeping a Bawdy-house**, — being indictable, an oral accusation of this offence is actionable. Griffin v. Moore, supra; Cook v. Rief, 52 N. Y. Super. 302.

advancement in life.¹ The same conclusion has also been reached in Ohio.² And in some of the other States this rule has been provided by statutes.³

§ 268. *Accusation of Contagious Disease.*

General. — A proper position in society being deemed by the law a thing of value,⁴ it becomes consequently actionable to impute to one what will necessarily, if the imputation is believed, exclude him from all society. This doctrine has not been practically carried into the moral qualities,⁵ but —

§ 269. **Physical Contagion.** — It is in general terms laid down as actionable to charge one with having any contagious disease;⁶ but not with having had it, because this does not, like the other, exclude him from society.⁷ The reported cases in which this doctrine was applied have all been such as of leprosy, which is incurable, and the various forms of venereal disease, which are specially odious. And we have no authority for saying that orally to charge one with having the mumps or the small-pox — infectious diseases which imply no moral delinquency, and quickly pass away — would be actionable.⁸

¹ *Snediker v. Poorbaugh*, 29 Iowa, 488, referring to *Beardsley v. Bridgman*, 17 Iowa, 290, 292; *Cleveland v. Detweiler*, 18 Iowa, 299, 300. And see *Reitan v. Goebel*, supra.

² *Alfele v. Wright*, 17 Ohio State, 238, 241; *Malone v. Stewart*, 15 Ohio, 319.

³ *Waugh v. Waugh*, 47 Ind. 580; *Belck v. Belck*, 97 Ind. 73; *Morris v. Barkley*, 1 Litt. 64; *Stieber v. Wensel*, 19 Mo. 513; *McBrayer v. Hill*, 4 Ire. 136; *Griffin v. Moore*, 43 Md. 246; *Buscher v. Scully*, 107 Ind. 246; *Kedrolivansky v. Niebaum*, 70 Cal. 216; *McKinney v. Roberts*, 68 Cal. 192.

⁴ Ante, § 254.

⁵ *Davis v. Brown*, 27 Ohio State, 326.

⁶ *Taylor v. Perkins*, Cro. Jac. 144; *James v. Rutledge*, 4 Co. 17 a; *Irons v. Field*, 9 R. I. 216; *Davis v. Brown*,

supra, at p. 328; *Crittall v. Horner*, Hob. 219 b; *Bloodworth v. Gray*, 8 Scott N. R. 9; *Kaucher v. Blinn*, 29 Ohio State, 62; *Brook v. Wise*, 2 Cro. Eliz. 878; *Clifton v. Wells*, 12 Mod. 634.

⁷ *Carslake v. Mapledoram*, 2 T. R. 473, 475; *Taylor v. Hall*, 2 Stra. 1189; *Golderman v. Stearns*, 7 Gray, 181.

⁸ "An action for oral slander, in charging the plaintiff with disease, has been confined to the imputation of such loathsome and infectious maladies as would make him an object of disgust and aversion, and banish him from human society. We believe the only examples which adjudged cases furnish are of the plague, leprosy, and venereal disorders." Hoar, J. in *Joannes v. Burt*, 6 Allen, 236, 239. And see post, § 282.

§ 270. *Accusation Injurious to One in his Business or Office* : —

General. — Any merely oral malicious¹ imputation upon one who is² alleged and proved to be of some particular lawful³ profession, calling, or business, or the incumbent of some particular office, of what is directly calculated⁴ to injure him therein, is actionable without any showing that injury has in fact followed.⁵ For example, —

§ 271. *Illustrations.* — To impute to a physician⁶ or an apothecary⁷ ignorance of his profession, or to a mechanic want of skill in his work ;⁸ to charge one in trade with keeping a disreputable place,⁹ or being a beggarly fellow and worth nothing ;¹⁰ to say of a postmaster that he would rob the mail ;¹¹ to call a preacher a drunkard,¹² a business man a defaulter,¹³ or a lawyer a cheat ;¹⁴ to accuse one who carries on a credit business with keeping false books,¹⁵ — each of these, if the words are spoken of the person in relation to his calling or

¹ Ante, § 257.

² The doctrine does not apply to a past business or office, which the party has relinquished. *Bellamy v. Burch*, 16 M. & W. 590 ; *Forward v. Adams*, 7 Wend. 204.

³ *Morris v. Langdale*, 2 B. & P. 284 ; *Hunt v. Bell*, 1 Bing. 1 ; *Marsh v. Davison*, 9 Paige, 580.

⁴ "Direct and probable result," *Brett, L. J. in Chamberlain v. Boyd*, 11 Q. B. D. 407, 413.

⁵ *Foulger v. Newcomb*, Law Rep. 2 Ex. 327, 330 ; *Jones v. Littler*, 7 M. & W. 423 ; *Terry v. Hooper*, 1 Lev. 115 ; *Arne v. Johnson*, 10 Mod. 111 ; *Singer v. Bender*, 64 Wis. 169 ; *Nelson v. Borchenius*, 52 Ill. 236 ; *Sanderson v. Caldwell*, 45 N. Y. 398, 405 ; *James v. Brook*, 9 Q. B. 7 ; *Gallwey v. Marshall*, 9 Exch. 294 ; *Caesar v. Curseny*, 1 Cro. Eliz. 305 ; *Phillips v. Jansen*, 2 Esp. 624 ; *Geary v. Bennett*, 65 Wis. 554 ; *Miller v. David*, Law Rep. 9 C. P. 118 ; *Kinney v. Nash*, 3 Comst. 177 ; *Hook v. Hackney*, 16 S. & R. 385 ; *Phillips v. Hoeffler*, 1 Barr, 62 ; *Davis v. Davis*, 1 Nott & McC. 290 ; *Ostrom v.*

Calkins, 5 Wend. 263 ; *Orr v. Skofield*, 56 Maine, 483.

⁶ *De Pew v. Robinson*, 95 Ind. 109 ; *Lynde v. Johnson*, 39 Hun, 12 ; *Berggold v. Puchta*, 2 Thomp. & C. 532 ; *Sumner v. Utley*, 7 Conn. 257.

⁷ *Tutty v. Alewin*, 11 Mod. 221.

⁸ *Fitzgerald v. Redfield*, 51 Barb. 484.

⁹ *Fitzgerald v. Robinson*, 112 Mass. 371, 381 ; *Riding v. Smith*, 1 Ex. D. 91. See *Plunkett v. Gillmore*, 8 Mod. 215.

¹⁰ *Simson v. Barlow*, 12 Mod. 591 ; *Garret v. Shelton*, 2 Show. 295 ; *Lewis v. Hawley*, 2 Day, 495 ; *Mott v. Comstock*, 7 Cow. 654 ; *Sewall v. Catlin*, 3 Wend. 291.

¹¹ *Craig v. Brown*, 5 Blackf. 44.

¹² *McMillan v. Birch*, 1 Binn. 178 ; *Hayner v. Cowden*, 27 Ohio State, 292.

¹³ *Noeninger v. Vogt*, 88 Mo. 589.

¹⁴ *Rush v. Cavanaugh*, 2 Barr, 187 ; *Chipman v. Cook*, 2 Tyler, 456 ; *Jenkins v. Smith*, Cro. Jac. 586 ; *Birchley's Case*, 4 Co. 16 a.

¹⁵ *Burtch v. Nickerson*, 17 Johns. 217 ; *Rathbun v. Emigh*, 6 Wend. 407.

office, and are so alleged and proved,¹ and if they injuriously affect him therein,² is an actionable slander *per se*, and no damage in fact need be shown. And still,—

§ 272. **Actual Damage.**—In this class of cases, the same as in those about to be stated, there are circumstances in which actual damage alleged and proved will sustain the action when otherwise it would fail.³

§ 273. *Accusation followed by Special Damage:*—

General.—An oral malicious⁴ accusation of anything defamatory,⁵ the natural and probable consequence⁶ whereof will be to inflict legal damage upon one, will, if on special allegation and proof such damage is shown to have resulted therefrom, sustain an action against the wrong-doer.⁷ Thus,—

§ 274. **Illustrations.**—To impute to a wife adultery, causing the withdrawal of the hospitalities of friends,⁸ or unchastity to a female lodger whereby she is turned out of the house,⁹ or to a woman incontinence causing grief which impairs her

¹ Van Tassel v. Capron, 1 Denio, 250; McGuire v. Blair, 2 Car. Law Repos. 443.

² Kinney v. Nash, 3 Comst. 177.

³ Windsor v. Oliver, 41 Ga. 538; Swan v. Tappan, 5 Cush. 104; Jones v. Diver, 22 Ind. 184; Foot v. Brown, 8 Johns. 64.

⁴ Ante, § 257.

⁵ Terwilliger v. Wands, 17 N. Y. 54, 62. The words "must be defamatory or injurious in their nature." Little-dale, J. in Kelly v. Partington, 5 B. & Ad. 645, 650. On the other hand, it is denied that they need be defamatory if they cause special damage. Bentley v. Reynolds, 1 McM. 16. "All words are actionable if a special damage follows." Heath, J. in Moore v. Meagher, 1 Taunt. 39, 44.

⁶ "The special damage must be the natural result of the thing done." Pat-teson, J. in Kelly v. Partington, 5 B. & Ad. 645, 651. "Must be the natural and immediate consequence." Bron-son, J. in Beach v. Ranney, 2 Hill,

N. Y. 309, 314; Grover, J. in Anony-mous, 60 N. Y. 262, 264. "Natural, immediate, and legal consequence." Strong, J. in Terwilliger v. Wands, 17 N. Y. 54, 57. "Legal and natural consequence." Lord Ellenborough, C. J. in Vicars v. Wilcocks, 8 East, 1, 3.

⁷ Pollard v. Lyon, 91 U. S. 225; Servatius v. Pichel, 34 Wis. 292; Rob-erts v. Roberts, 5 B. & S. 384; Storey v. Challands, 8 Car. & P. 234; Hartley v. Herring, 8 T. R. 130; Vicars v. Wil-cocks, 8 East, 1; Prettyman v. Shock-ley, 4 Harring. Del. 112; Bentley v. Reynolds, 1 McM. 16; Ward v. Weeks, 7 Bing. 211; Beach v. Ranney, 2 Hill, N. Y. 309; Cook v. Cook, 100 Mass. 194; Bassil v. Elmore, 65 Barb. 627; Wilson v. Cottman, 65 Md. 190; Stud-dard v. Trucks, 31 Ark. 726.

⁸ Moore v. Meagher, 1 Taunt. 39; Davies v. Solomon, Law Rep. 7 Q. B. 112. The same though the woman is unmarried. Williams v. Hill, 19 Wend. 305.

⁹ Knight v. Gibbs, 1 A. & E. 43.

ability to pursue her usual avocations;¹ or to say to a man that his affianced is the mother of a bastard, whereby she loses her marriage,²—these are severally apt illustrations of slander with special damage. Loss of employment,³ or of the sale of property,⁴ or of a customer,⁵ or dismissal from the office of constable,⁶ is also, among numerous other like evil consequences, special damage.

§ 275. *Other Matters* : —

Actionable Per Se — Damage. — When the words are actionable *per se*,⁷ — that is, when they come under any of the foregoing heads except the last, — the action is maintainable without any proof of actual damage, the wrong implying injury.⁸ But it is common for the parties, on the one side and on the other, to introduce evidence in aggravation and mitigation of damages, a question not for particular consideration here.⁹

§ 276. **Published.** — Oral words must, like written ones, be published — that is, uttered in the hearing of a third person — to constitute a ground of action; for without publication there has been no injury.¹⁰ But it does not take away their legal effect for the utterer to say that he does not believe them.¹¹ If they are not meant or understood to be spoken as truth, they are not slander.¹²

§ 277. **Meaning.** — There is just ground for saying that words are not actionable unless understood by the hearers in the evil sense which the law requires; because, in the absence

¹ Underhill v. Welton, 32 Vt. 40; Bradt v. Towsley, 13 Wend. 253. But see, and query, dictum in Terwilliger v. Wands, 17 N. Y. 54, 63. See ante, § 254, note.

² Davis v. Gardiner, 4 Co. 16 b; Holwood v. Hopkins, 2 Cro. Eliz. 787.

³ Martin v. Strong, 5 A. & E. 535.

⁴ Gott v. Pulsifer, 122 Mass. 235.

⁵ Storey v. Challands, 8 Car. & P. 234; Browning v. Newman, 1 Stra. 666.

⁶ Kendillon v. Maltby, Car. & M. 402, 2 Moody & R. 438. See Edwards v. Howell, 10 Ire. 211.

⁷ Ante, § 254.

⁸ Boldt v. Budwig, 19 Neb. 739; Cook v. Field, 3 Esp. 133; Brown v. Smith, 13 C. B. 596, 17 Jur. 807; Tripp v. Thomas, 3 B. & C. 427.

⁹ Rhodes v. Naglee, 66 Cal. 677; Tillotson v. Cheetham, 3 Johns. 56; Douglass v. Craig, 3 La. An. 639; Lamos v. Snell, 6 N. H. 413; Howell v. Howell, 10 Ire. 84; post, § 310.

¹⁰ Ante, § 24; Broderick v. James, 3 Daly, 481; Taylor v. How, 2 Cro. Eliz. 861.

¹¹ Finch v. Finch, 21 S. C. 342.

¹² Haynes v. Haynes, 29 Maine, 247.

of such understanding, there is no injury.¹ But *prima facie* they will be presumed to have been understood according to their common import,² and as they would naturally impress the minds of the hearers,³ or as the defendant meant them.⁴ The doctrine thus stated is theoretically unquestionable,⁵ but there are practical objections to it, and there is authority for saying that, on the other hand, the meaning which, under all the circumstances, they were calculated to impress on the minds of the hearers should determine the speaker's responsibility.⁶

III. *Written Slander, or Libel.*

§ 278. **Same as Oral, and More.**— Words which are actionable when orally spoken, within the explanations of the last sub-title, are not the less so if written; or, as otherwise expressed, "it will be stronger in the case of a libel."⁷ So that the doctrines of the last sub-title are applicable to this, as far as they extend; and the principal purpose of the present sub-title is to ascertain the wider outer limits in libel. Now,—

§ 279. **In Criminal Law.**— Libel, with a very narrow margin of verbal slander, is one of the wrongs against the public punishable as crime.⁸ And it is one of the doctrines in our jurisprudence that he who suffers from a crime specially, in a way or degree differing from the rest of the public, may have his civil action against the wrong-doer.⁹ Hence —

¹ Studdard v. Linville, 3 Hawks, 474; Barton v. Holmes, 16 Iowa, 252; Leonard v. Allen, 11 Cush. 241; Nidever v. Hall, 67 Cal. 79.

² Sheridan v. Sheridan, 58 Vt. 504; Thirman v. Matthews, 1 Stew. 384; Ogden v. Riley, 2 Green, N. J. 186; McGowan v. Manifee, 7 T. B. Monr. 314; Butterfield v. Buffum, 9 N. H. 156; Cooper v. Perry, Dudley, Ga. 247; Hugley v. Hugley, 2 Bailey, 592; Carroll v. White, 33 Barb. 615; Fallenstein v. Boothe, 13 Mo. 427.

³ Campbell v. Campbell, 54 Wis. 90; Hankinson v. Bilby, 16 M. & W. 442.

⁴ Davis v. Johnston, 2 Bailey, 579; Welsh v. Eakle, 7 J. J. Mar. 424; Garrett v. Dickerson, 19 Md. 418; De Moss v. Haycock, 15 Iowa, 149; Read v. Ambridge, 6 Car. & P. 308; Shipley v. Todhunter, 7 Car. & P. 680.

⁵ Ante, § 24.

⁶ Dixon v. Stewart, 33 Iowa, 125; Jarnigan v. Fleming, 43 Missis. 710; Nelson v. Borchenius, 52 Ill. 236; Miller v. Johnson, 79 Ill. 58.

⁷ Harman v. Delany, 2 Stra. 898, 899.

⁸ 2 Bishop Crim. Law, § 905-949.

⁹ Ante, § 71; 1 Bishop Crim. Law, § 264; post, § 355.

§ 280. **Defined.**—Libel, viewed as tort, is any published written slander which would be actionable if uttered orally, or which in fact has done to the person libelled special damage; or any written words, sign, picture, effigy, or other like representation, published maliciously,¹ which imputes to one dishonesty or any other repulsive moral or physical quality, or is calculated to bring him into hatred, contempt, or ridicule.² To particularize,—

¹ Ante, § 257.

² Largely, in our books, written and oral slander, and the civil and criminal libel, are mixed where they ought to be distinct and separate. The drawing of the true partition lines between them is indispensable to any proper understanding of the subject. Thus, as to the definition: in the criminal case of *People v. Croswell*, 3 Johns. Cas. 337, 354, a libel is defined to be “a censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent towards government, magistrates, or individuals.” This definition, though not in the more common terms, harmonizes with the ordinary definitions of the criminal libel. 2 Bishop Crim. Law, § 907, 908. Thereupon, in the civil action of *Steele v. Southwick*, 9 Johns. 214, 215, it is judicially observed that “the definition of a libel, as given by Mr. Hamilton in the case of *People v. Croswell*, is drawn with the utmost precision;” so this definition of the crime is adopted as that of the tort, without its occurring to the learned court that there is a wide distinction. And the same thing is repeated in the subsequent case of *Cooper v. Greeley*, 1 Denio, 347, 359. It is repeated also in *Price v. Whitely*, 50 Mo. 439. Now, on the face of this definition, it is a great way astray when applied to the civil libel. A writing simply ridiculing the government, and not any particular officer of it, could not be actionable, because there would be no plaintiff who had suffered an injury, other than the government. And the government could

not bring a civil suit, its remedy would be by indictment. On the other hand, this definition leaves outside of its purview, a mass of civil wrong undefined, yet always regarded as libel. Something precisely like this occurs in the Massachusetts civil case of *Clark v. Binney*, 2 Pick. 113, 115. “The law,” it is there observed, “holds that to be a libel which, in writing or printing, or by signs, or pictures, maliciously reproaches the memory of the dead, or defames the reputation of the living, and tends to excite toward them public contempt or hatred. In Com. Dig. tit. Libel, A, a libel is defined to be ‘a contumely or reproach, published to the defamation of the government, of a magistrate, or of a private person.’ But the most clear and precise definition of a libel, as applicable to personal actions, is contained in the opinion of the late Chief Justice Parsons, in the case of *Commonwealth v. Clap*, 4 Mass. 163, 168. ‘It is,’ says he, ‘a malicious publication, expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule.’ To the correctness of this definition no objection can now be urged. It rests upon the authority of an unbroken series of decisions for ages, and its application to the condition of civilized society, and to individuals in social life, has the sanction of reason, and the approval of every reflecting and intelligent mind.” Thereupon this learned court, without

§ 281. **Actionable if Oral.** — It is but repetition to say that any words which are actionable when oral are so also when written; as, for example, words charging one with a crime,¹ or charging a physician with culpable neglect in a case,² or an attorney-at-law with professional misconduct,³ or being a “shyster.”⁴ In addition to which, —

§ 282. **Because Written.** — To an extent not well defined in the books, words less odious than are required to constitute actionable oral slander, yet of the like general sort, will, if written, sustain a civil suit for libel.⁵ Cooley⁶ illustrates this, thus: “to say of a man, ‘I look upon him as a rascal,’ is no slander, unless shown to be damaging; but, if it be published of him in one of the public journals, the presumption that injury follows is reasonable and legitimate.”⁷ So, to call a man in print ‘an imp of the devil and cowardly snail’ is libellous, though an oral imputation of the sort would be presumably harmless.”⁸ And Daniel, J., in illustration, observes: “To

any thought of the distinction between an indictment and an action of tort, proceeds to apply this criminal definition to the civil case in hand. Possibly, if the civil suit had happened to be, as it was not, one by a dead man for a reproach cast upon his memory, the judges would have looked upon the definition as a little mixed, and inquired whether there was not here, after all, a distinction. See also, of the like sort, *Hermann v. Bradstreet Co.* 19 Mo. Ap. 227; and *Legg v. Dunleavy*, 80 Mo. 558, and *Keemle v. Sass*, 12 Misso. 499, referred to therein. In the later Massachusetts case of *Miller v. Butler*, 6 Cush. 71, 75, where civil damages were claimed for the publishing of a libel, the court does not recall this prior matter, but quotes approvingly the following from a note to *Craft v. Boite*, 1 Saund. Wms. ed. 246 b, 248: “To write or publish anything of another, which either makes him ridiculous, or holds him out as a dishonest man, is held to be actionable, when the speaking of the same words would not be.” And the following cases are cited: *Villers v. Monsley*, 2 Wils.

403; *Austin v. Culpeper*, Skin. 123, s. c. 2 Show. 313; *Bell v. Stone*, 1 B. & P. 331.

¹ *Boogher v. Knapp*, 76 Mo. 457; *Dwyer v. Firemen's Journal*, 11 Daly, 248; *Ryer v. Firemen's Journal*, 11 Daly, 251; *Wilson v. Noonan*, 35 Wis. 321; *Simmons v. Holster*, 13 Minn. 249; *Manner v. Simpson*, 13 Daly, 156; *Mallory v. Pioneer Press*, 34 Minn. 521; *Jones v. Townsend*, 21 Fla. 431.

² *Pratt v. Pioneer Press*, 35 Minn. 251.

³ *Young v. Clegg*, 93 Ind. 371; *Ludwig v. Cramer*, 53 Wis. 193; *Atkinson v. Detroit Free Press*, 46 Mich. 341.

⁴ *Gribble v. Pioneer Press*, 34 Minn. 342.

⁵ Ante, § 255; *White v. Nicholls*, 3 How. U. S. 266, 285, 286.

⁶ Cooley Torts, 205.

⁷ Referring to *Williams v. Karnes*, 4 Humph. 9; *Cropp v. Tilney*, 3 Salk. 225; *J'Anson v. Stuart*, 1 T. R. 748. See *Whitney v. Janesville Gazette*, 5 Bis. 330.

⁸ Referring to *Price v. Whitely*, 50

publish of a man in writing that he had the itch and smelt of brimstone, has been held to be a libel,"¹ yet it would not be actionable to say the same thing of him orally.² Again, to charge, in a published writing, one with ingratitude is an actionable libel,³ but plainly the same words uttered orally would not sustain a suit. In like manner, —

§ 283. **Dishonesty.** — Any written malicious charge of dishonesty is a libel, whether the oral uttering of the same words would be actionable or not;⁴ as, that a particular druggist sells counterfeit Haarlem oil and puts it in counterfeit wrappers,⁵ or that a person named is a "hoary-headed filcher,"⁶ or an "infernal villain;"⁷ or that a particular newspaper publisher is a party to a secret conclave, wherein for money he sold to a corporation the advocacy of his paper.⁸ But the mere written accusation of something assumed to be morally dishonest while it accords with the law is not libellous;⁹ as, that the person, in answer to a suit, set up the Statute of Limitations,¹⁰ or the prohibitory liquor law.¹¹

§ 284. **Special Damage.** — A libel which the courts deem not sufficiently intense in evil,¹² or not directly enough damaging, to be actionable *per se*,¹³ may still sustain a suit if it has in fact done the party damage, and the same is alleged and proved, according to the explanations given under the head of oral slander.¹⁴ An instance of what is sometimes called libel, but is more accurately termed slander of title, to be

Mo. 439. See *Atwill v. Mackintosh*, 120 Mass. 177; *Cary v. Allen*, 39 Wis. 481.

¹ Referring to *Villers v. Monsley*, 2 Wils. 403.

² *White v. Nicholls*, supra. And see ante, § 269.

³ *Cox v. Lee*, Law Rep. 4 Ex. 284.

⁴ *Huse v. Inter-ocean Publishing Co.* 12 Bradw. 627; *Miller v. Butler*, 6 Cush. 71, 75; *Sanderson v. Caldwell*, 45 N. Y. 398, 402; *Digby v. Thompson*, 4 B. & Ad. 821, 826; *Shelton v. Nance*, 7 B. Monr. 128; *Donaghue v. Gaffy*, 53 Conn. 43; *Stone v. Cooper*, 2 Denio, 293, 300.

⁵ *Steketee v. Kimm*, 48 Mich. 322.

⁶ *Crocker v. Hadley*, 102 Ind. 416.

⁷ *Bell v. Stone*, 1 B. & P. 331.

⁸ *Fitch v. De Young*, 66 Cal. 339.

⁹ *Stone v. Cooper*, 2 Denio, 293, 301; *Greville v. Chapman*, 5 Q. B. 731.

¹⁰ *Bennett v. Williamson*, 4 Sandf. 60.

¹¹ *Homer v. Engelhardt*, 117 Mass. 539.

¹² Ante, § 35, 36, 258.

¹³ Ante, § 254; *Legg v. Dunleavy*, 80 Mo. 558; *Delegall v. Highley*, 8 Car. & P. 444.

¹⁴ Ante, § 273, 274; *Stone v. Cooper*, 2 Denio, 293, 299, 300; *Bergmann v. Jones*, 94 N. Y. 51.

treated of in a chapter further on,¹ occurs where the writing is disparaging, not of the person, but of his property, and then special damage must always be alleged and proved.²

§ 285. **Contempt and Ridicule — Blackening Reputation.** — An indictable libel on an individual is any "representation of a nature to blacken his reputation, or to hold him up to contempt and ridicule."³ The public mischief, by reason of which it is classed as a crime, lies in its tendency to stir up bad blood, leading to breaches of the peace. Since, in such a case, the individual libelled suffers specially, not only may the public prosecute the crime, but he may have his civil action for the private wrong.⁴ Thus, as holding up a man to contempt and ridicule, it is actionable as well as indictable to state in writing of him that he "has turned into an enormous swine, which lives on lame horses," and "will probably remain a swine the rest of his days;"⁵ or, that he has put himself into unlawful relations with the wives of other men;⁶ or, being a railroad passenger agent, that he has grown rich by making local ticket agents divide their commissions with him.⁷ Yet it is not a libel simply to charge one with something which the writer deems reprehensible, while the law holds it not to be wrong;⁸ as, getting a lease of premises which another was occupying as tenant at will.⁹ The illustrations of this sort of libel are innumerable, but they will best be seen in the books on the criminal law and in the digests.

§ 286. **Published.** — The rules of the criminal law as to publishing a libel¹⁰ do not apply to the civil suit. There must

¹ Post, § 344 et seq.

² *Dooling v. Budget Pub. Co.* 144 Mass. 258; *Jenner v. A'Beckett*, Law Rep. 7 Q. B. 11.

³ 2 Bishop Crim. Law, § 929.

⁴ Ante, § 279; *Atwill v. Mackintosh*, 120 Mass. 177; *Miller v. Butler*, 6 Cush. 71; *McMurry v. Martin*, 26 Mo. Ap. 437; *Bettner v. Holt*, 70 Cal. 270.

⁵ *Solverson v. Peterson*, 64 Wis. 198. Illustrations mentioned in this case are "a frozen snake," *Hoare v. Silverlock*, 12 Q. B. 624; "an itchy old

toad," *Villers v. Monsley*, 2 Wils. 403; "a black sheep," *McGregor v. Gregory*, 11 M. & W. 287.

⁶ *Broad v. Deuster*, 8 Bis. 265.

⁷ *Shattuc v. McArthur*, 25 Fed. Rep. 133, 29 Ib. 136.

⁸ *Trimble v. Anderson*, 79 Ala. 514; *Wallace v. Bennett*, 1 Abb. N. Cas. 478; *Achorn v. Piper*, 66 Iowa, 694.

⁹ *Donaghue v. Gaffy*, 54 Conn. 257. And see *Payne v. Western, &c. Rld.* 13 Lea, 507.

¹⁰ 2 Bishop Crim. Law, § 926, 927.

be the same publication as in oral slander, and for the same reason.¹ For example, though it is indictable to write a libel and send it by mail sealed to the person libelled, it is not actionable.² Every sale of a libel is a fresh publication,³ or the number of copies sold may be shown to enhance the damages.⁴ If the libel is in German, it is not a publication simply to deliver it to one who does not understand the language.⁵ And in England it has been held not to be a publication for one to hand over the libel to his wife; the two being, as to this question, one person.⁶

IV. *The Justifications and Defences.*

§ 287. **What.** — There are four justifications and defences: First, That the words are true; Secondly, That the person injured by them is not in a condition to complain; Thirdly, That they are absolutely privileged; Fourthly, That they are conditionally privileged. The effect of which several defences is, that the person injured is without redress, so that he bears alone and uncompensated the suffering or loss as a common accident of life, explained in a preceding chapter.⁷ We shall close this sub-title by inquiring, Fifthly, How the several questions are to be determined.

§ 288. **First. *That the Words are true:*** —

General. — The perplexities which at different periods have embarrassed the attempt to justify libels by showing their truth, relate to the criminal prosecution, not the civil. To an action for words, whether oral or printed, it was always and

¹ *Ante*, § 276.

² *Spaits v. Poundstone*, 87 Ind. 522, referring to *Barrow v. Lewellin*, Hob. 62 a; *Lyle v. Clason*, 1 Caines, 581; *Fonville v. McNease*, Dudley, S. C. 303; *Delacroix v. Thevenot*, 2 Stark. 63. The reason of the distinction is, that a libel is indictable because of its tending to a breach of the peace, which is as great if sent directly to the person libelled as to a third person; it is actionable because injurious to the reputation,

and one's reputation is not injured by a writing which is put into the hands of no third person.

³ *Staub v. Van Benthuyssen*, 36 La. An. 467.

⁴ *Bigelow v. Sprague*, 140 Mass. 425.

⁵ *Mielenz v. Quasdorf*, 68 Iowa, 726; *ante*, § 24.

⁶ *Wennhak v. Morgan*, 20 Q. B. D. 635, 637. And see *Campbell v. Bannister*, 79 Ky. 205.

⁷ *Ante*, § 176-184.

is a sufficient answer that they are true.¹ But the truth must be absolute;² it only mitigates the damages to prove that the defendant believed them to be true.³ An apparent exception to this doctrine is —

§ 289. **Pardon** — is, in legal contemplation, a remission of guilt, not merely of the punishment.⁴ Therefore it is libel or slander to accuse one of an offence whereof he has been pardoned, the defence of the truth not being available.⁵

§ 290. Secondly. *That the Person injured by the Words is not in a Condition to complain: —*

General. — The doctrine, applicable to all torts, that one to maintain his suit must have suffered an injury to which he did not consent, and must be otherwise meritorious in respect of that whereof he complains, is stated in a preceding chapter.⁶ So much of that doctrine as in its nature is applicable to libel and slander governs the subject for consideration here. Thus, —

§ 291. **Consent (Asking).** — If one, directly or through an agent, asks of another a question concerning himself, he thereby impliedly licenses the other to answer according to his own understanding of the truth, but not otherwise. Then, should the answer be a libel or slander, the person uttering it is justified or not, according as his purpose is honest or malicious.⁷

¹ 1 Bishop Crim. Law, § 591; 2 Ib. § 918; Underwood v. Parks, 2 Stra. 1200; Haws v. Stanford, 4 Sneed, Tenn. 520; Foss v. Hildreth, 10 Allen, 76, 79; Mundy v. Wight, 26 Kan. 173; Jones v. Bewicke, Law Rep. 5 C. P. 32; Thrall v. Smiley, 9 Cal. 529; Donaghue v. Gaffy, 53 Conn. 43; Root v. King, 7 Cow. 613, 618, 628; Perry v. Breed, 117 Mass. 155, 166; Bisbey v. Shaw, 2 Kernan, 67; Burckhalter v. Coward, 16 S. C. 435; Mitchell v. Milholland, 106 Ill. 175; Riley v. Norton, 65 Iowa, 306; Bell v. McGinness, 40 Ohio State, 204.

² Brooks v. Bemiss, 8 Johns. 455, 458; O'Brien v. Bryant, 16 M. & W. 168; Swann v. Rary, 3 Blackf. 298; Corbley v. Wilson, 71 Ill. 209; Gregory v. Atkins, 42 Vt. 237; Williams v. Gunnels, 66 Ga. 521.

³ Wozelka v. Hettrick, 93 N. C. 10; Dolevin v. Wilder, 7 Rob. N. Y. 319; Cass v. New Orleans Times, 27 La. An. 214; Quinn v. Scott, 22 Minn. 456; Morris v. Lachman, 68 Cal. 109; Trimble v. Foster, 87 Mo. 49.

⁴ 1 Bishop Crim. Law, § 898 and note.

⁵ Ib.; Cuddington v. Wilkins, Hob. 81 b; Searle v. Williams, Hob. 288; Leyman v. Latimer, 3 Ex D. 15, 352, 13 Cox C. C. 632, 14 Cox C. C. 51. Contra, Baum v. Clause, 5 Hill, N. Y. 196.

⁶ Ante, § 49–65.

⁷ Beeler v. Jackson, 64 Md. 589, 593; Brow v. Hathaway, 13 Allen, 239; Spaits v. Poundstone, 87 Ind. 522, 526; Warr v. Jolly, 6 Car. & P. 497; Griffiths v. Lewis, 7 Q. B. 61, 67; Hopwood v. Thorn, 8 C. B. 293, 14 Jur.

And within this doctrine, if one seeking material for a libel suit gets his friend to write a letter of inquiry, he cannot found his action upon the reply.¹

§ 292. **Provoked.** — A slander will not justify a slander in return. Nor will it even mitigate the damages to show that, on a previous occasion, the plaintiff published equally injurious words of the defendant;² on the same occasion, it will.³ So, —

§ 293. **Ill Repute.** — One's ill conduct⁴ or ill repute does not authorize another to aggravate the fact by charging him with what he cannot prove.⁵ But in proper circumstances matter of this sort may be brought forward in mitigation of damages.⁶

§ 294. **Unlawful Business.** — Unlike a prior wrong or provocation, set up in answer to a slander, is an unlawful business concerning which the evil words were spoken. Within the principle that one cannot have the law's protection in violating law,⁷ he cannot complain of a slander upon him in respect of an unlawful occupation;⁸ as, for example, a libel upon him in his vocation of the unlicensed selling of intoxicating liquor contrary to a statute.⁹

§ 295. **Thirdly. That the Words are absolutely Privileged: —**

General. — The doctrine that one who follows a command or permission of the law is not liable to another casually in-

87. See *Sullings v. Shakespeare*, 46 Mich. 408.

¹ *King v. Waring*, 5 Esp. 13. See *Weatherston v. Hawkins*, 1 T. R. 110, 112; *Smith v. Wood*, 3 Camp. 323.

² *Bourland v. Eidson*, 8 Grat. 27; *Child v. Homer*, 13 Pick. 503.

³ *McClintock v. Crick*, 4 Iowa, 453; *Moore v. Clay*, 24 Ala. 235; *Powers v. Presgroves*, 38 Missis. 227; *Steever v. Beehler*, 1 Miles, 146; *Goodbread v. Ledbetter*, 1 Dev. & B. 12.

⁴ *Parkhurst v. Ketchum*, 6 Allen, 406.

⁵ *Graham v. Stone*, 6 How. Pr. 15; *Cole v. Perry*, 8 Cow. 214.

⁶ *Pope v. Welsh*, 18 Ala. 631;

Young v. Bennett, 4 Scam. 43; *Wolcott v. Hall*, 6 Mass. 514; *Alderman v. French*, 1 Pick. 1; *Henson v. Veatch*, 1 Blackf. 369; *Shilling v. Carson*, 27 Md. 175; *Nelson v. Evans*, 1 Dev. 9; *Wetherbee v. Marsh*, 20 N. H. 561. But see *Mapes v. Weeks*, 4 Wend. 659; *Scott v. McKinnish*, 15 Ala. 662; *Inman v. Foster*, 8 Wend. 602; *Treat v. Browning*, 4 Conn. 408.

⁷ Ante, § 54 et seq.

⁸ *Hunt v. Bell*, 1 Bing. 1; *Manning v. Clement*, 7 Bing. 362; *Fry v. Bennett*, 3 Bosw. 200.

⁹ *Wilbor v. Williams*, 8 Bost. Law Reporter, 439.

jured thereby,¹ furnishes a wide protection to defendants in libel and slander. But this principle covers, in general, only honest and careful utterances.² And he who steps outside of or beyond the law's command or permission, cannot, on the forbidden ground, have the shelter thus provided for the obedient.³ It is the policy of the law to furnish in some things a specially high protection, termed absolute, in contrast to its ordinary conditional protection. Thus, —

§ 296. **The Judge** — of any of the higher courts is, in the trial of a cause, exempt from any suit for words spoken, however irrelevant or malicious. And this rule applies in a general way to the inferior judges and magistrates acting within their jurisdiction, though perhaps it does not protect them as to irrelevant words maliciously uttered. For the public good, not as a screen to the individual incumbent of the bench, the judicial functions are left thus free and untrammelled.⁴

§ 297. **Juror.** — A juror is thus absolutely privileged, as to any words, however irrelevant, uttered while the jury are retired deliberating on their verdict.⁵ The protection of jurors is very high,⁶ and it is believed that this principle covers all their acts in any cause civil or criminal.⁷

§ 298. **Witness.** — The same high protection is accorded to a witness answering any questions, relevant or irrelevant, propounded to him by either party in a judicial investigation;⁸ and it is so even though he is stopped before he has fully explained his answer, and he completes the explanation after being forbidden by the court.⁹ For words not responsive to

¹ Ante, § 111.

² Ante, § 114 et seq.

³ Ante, § 116.

⁴ *Floyd v. Barker*, 12 Co. 23; *Yates v. Lansing*, 9 Johns. 395; *Scott v. Stansfield*, Law Rep. 3 Ex. 220; *Rex v. Skinner*, Lofft, 55, 56; *Kendillon v. Maltby*, 2 Moody & R. 438; *Thomas v. Churton*, 2 B. & S. 475; *Bradley v. Fisher*, 13 Wal. 335; *Seaman v. Netherclift*, 1 C. P. D. 540, 544. See *McDermott v. Evening Journal*, 14 Vroom, 488.

⁵ *Dunham v. Powers*, 42 Vt. 1.

⁶ *Bushell's Case*, Vaugh. 135, 146-149.

⁷ *Rex v. Skinner*, Lofft, 55, 56; *Turpen v. Booth*, 56 Cal. 65.

⁸ *Terry v. Fellows*, 21 La. An. 375; *Nelson v. Robe*, 6 Blackf. 204; *Smith v. Higgins*, 16 Gray, 251; *Barnes v. McCrate*, 32 Maine, 442; *Calkins v. Sumner*, 13 Wis. 193. And see *Verner v. Verner*, 64 Missis. 321; *Marsh v. Ellsworth*, 50 N. Y. 309.

⁹ *Seaman v. Netherclift*, 1 C. P. D. 540; s. c. on appeal, 2 C. P. D. 53.

questions, and not material to the matter in controversy, he is liable only if they are both slanderous and malicious.¹ Such is, at least, the settled English doctrine; but we have American cases which refuse to the witness protection as to words both malicious and irrelevant, perhaps even malicious only, though given in the course of his examination.² Certainly the freedom and fairness of a trial are not promoted by a rule which puts the witness in fear of being sued by the party against whom he testifies, — in reason, the same rule applying to him as to the judge on the bench.

§ 299. *Affidavit.* — An affidavit in a cause has the high protection we are considering,³ — subject, perhaps, to exception where it maliciously introduces irrelevant matter.⁴

§ 300. *Party — Counsel.* — The utterances of a party, in his pleadings and in the trial of a cause, are also within this protection.⁵ So also are those of his counsel,⁶ if pertinent to the issue,⁷ not otherwise.⁸ In the respect last mentioned, the liability of counsel differs from that of the judge, as well by English opinion as by American; “for,” said Coleridge, C. J., “it has never yet been decided that they would not be subject to an action for words spoken even during the conduct of a case, if the words were irrelevant, *mala fide*, and spoken with express malice.”⁹

¹ *Smith v. Howard*, 28 Iowa, 51; *Ayres v. Sedgwick*, Palmer, 142.

² Not undertaking to go into this subject deeply, I will here refer to *Rice v. Coolidge*, 121 Mass. 393, 395; *Hoar v. Wood*, 3 Met. 193; *McLaughlin v. Cowley*, 127 Mass. 316; *White v. Carroll*, 42 N. Y. 161; *Storey v. Wallace*, 60 Ill. 51; *Marsh v. Ellsworth*, 50 N. Y. 309; *Liles v. Gaster*, 42 Ohio State, 631.

³ *Eyres v. Sedgewicke*, Cro. Jac. 601; *Revis v. Smith*, 18 C. B. 126, 2 Jur. n. s. 614; *Henderson v. Broomhead*, 4 H. & N. 569; *Dawling v. Venman*, 3 Mod. 108; *Stevens v. Sampson*, 5 Ex. D. 53, 55; *Francis v. Wood*, 75 Ga. 648.

⁴ *Reid v. McLendon*, 44 Ga. 156; *Powell v. Kane*, 5 Paige, 265. And see cases cited to the last section.

⁵ *Garr v. Selden*, 4 Comst. 91; *Ast-*

ley v. Younge, 2 Bur. 807; *Badgley v. Hedges*, 1 Penning. 233. But he is not

always thus protected as to foreign matter. *Wyatt v. Buell*, 47 Cal. 624.

⁶ *Marsh v. Ellsworth*, 50 N. Y. 309; *Rex v. Skinner*, Loft, 55; *Strauss v. Meyer*, 48 Ill. 385; *Dada v. Piper*, 41 Hun, 254; *Hollis v. Meux*, 69 Cal. 625.

⁷ *Hodgson v. Scarlett*, 1 B. & Ald. 232; *Hoar v. Wood*, 3 Met. 193; *Hastings v. Lusk*, 22 Wend. 410.

⁸ *Brook v. Montague*, Cro. Jac. 90; *Gilbert v. People*, 1 Denio, 41; *Warner v. Paine*, 2 Sandf. 195; *Ring v. Wheeler*, 7 Cow. 725; *McLaughlin v. Cowley*, 131 Mass. 70; *Lester v. Thurmond*, 51 Ga. 118.

⁹ *Seaman v. Netherclift*, 1 C. P. D. 540, 545.

§ 301. **Other Cases.** — There are other cases of absolute or semi-absolute privilege; such as petitions to the legislature or a legislative committee,¹ words spoken in a legislative debate,² the testimony of a witness before a military court of inquiry;³ but space will not permit the prolonging of this subject. Some courts have expressed the inclination, in the words of Lord Coleridge, C. J., not “to extend the bounds” of this high privilege.⁴

§ 302. **Fourthly.** *That the Words are conditionally privileged:* —

Defined. — Referring back to a preceding section,⁵ we may add, as the doctrine here to be considered, that, whenever the law,⁶ or any social duty which the law recognizes,⁷ permits or requires an utterance not thus privileged absolutely, it is conditionally so, — that is, if cautiously and circumspectly made, so as not to inflict needless injury,⁸ in other words if it is honest and without malice, — otherwise it is not protected.⁹ In the application of this doctrine, let us first consider —

§ 303. **The Protecting Occasion.** — Though the facts which give the protection do not exist, still, if “there is a reasonable belief on the part of the person making the communication” that they do, they will on principle, and probably on the authorities, render the occasion privileged the same as they would were their existence real.¹⁰ For the mistake was in-

¹ *Lake v. King*, 1 Saund. Wms. ed. 131 b.

² *Coffin v. Coffin*, 4 Mass. 1; *Dunham v. Powers*, 42 Vt. 1.

³ *Dawkins v. Rokeby*, Law Rep. 8 Q. B. 255, affirmed Law Rep. 7 H. L. 744.

⁴ *Stevens v. Sampson*, 5 Ex. D. 53, 55.

⁵ Ante, § 295.

⁶ Ante, § 110 et seq.

⁷ Ante, § 122 et seq.

⁸ Ante, § 115.

⁹ *Moore v. Butler*, 48 N. H. 161; *Byam v. Collins*, 39 Hun, 204; *Marks v. Baker*, 28 Minn. 162; *Wason v.*

Walter, Law Rep. 4 Q. B. 73; *Fisk v. Soniat*, 33 La. An. 1400; *Briggs v. Garrett*, 1 Am. Pa. 404; *Kirkpatrick v. Eagle Lodge*, 26 Kan. 384; *Billings v. Fairbanks*, 139 Mass. 66; *Shurtleff v. Parker*, 130 Mass. 293; *Miner v. Detroit Post, &c. Co.* 49 Mich. 358; *Maclean v. Scripps*, 52 Mich. 214; *Wieman v. Mabey*, 45 Mich. 484; *Saunders v. Baxter*, 6 Heisk. 369; *Alpin v. Morton*, 21 Ohio State, 536; *Fitzgerald v. Robinson*, 112 Mass. 371; *Servatius v. Pichel*, 34 Wis. 292.

¹⁰ *Whiteley v. Adams*, 15 C. B. N. S. 392, 10 Jur. N. S. 470, 472; *Billings v. Fairbanks*, 139 Mass. 66.

evitable, therefore the person suffering from it must bear the consequence as one of the common accidents of life.¹ Thereupon, looking at the circumstances from the standpoint of the party speaking, his duty to make the communication need not, in order to protect him, be one "which may be enforced by indictment, action, or mandamus;" but "moral and social duties of imperfect obligation" will suffice. So will the party's own interests; for every one owes it to himself to look after them.² The circumstances, therefore, which make an occasion privileged are diverse and innumerable.³ It would be useless to attempt to enumerate all, but the following are —

§ 304. *Illustrations.* — A letter written by a man to his wife's mother, cautioning her against one whom she contemplated marrying, was in an English jury case ruled by Alderson, B., to be privileged.⁴ But a like letter, written to a girl by her friend and former pastor under like circumstances, was in Massachusetts adjudged not to be privileged; for he was not of kin to her, and he had no interest in her welfare.⁵

¹ Ante, § 156, 176–184.

² *Harrison v. Bush*, 5 Ellis & B. 344, 348, 349; *Cockayne v. Hodgkisson*, 5 Car. & P. 543; *Somerville v. Hawkins*, 10 C. B. 583, 15 Jur. 450; *Coxhead v. Richards*, 2 C. B. 569; *Moore v. Butler*, 48 N. H. 161; *Clapp v. Devlin*, 35 N. Y. Super. 170.

³ One of the common forms of stating the principle is: "A communication made *bona fide*, upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty to perform, is privileged, if made to a person having a corresponding interest or duty, although it contains defamatory matter, which without such privilege would be libellous and actionable." *Joannes v. Bennett*, 5 Allen, 169, 170, taken from *Harrison v. Bush*, *supra*, and the rules recognized in *Gassett v. Gilbert*, 6 Gray, 94, and the cases there cited. Bigelow, C. J. observes that "It would be difficult to state the result of judicial decisions on

this subject, and of the principles on which they rest, in a more concise, accurate, and intelligible form."

⁴ *Todd v. Hawkins*, 8 Car. & P. 88.

⁵ *Joannes v. Bennett*, 5 Allen, 169.

There was in this case, unnoticed by the court in its opinion, a fact which should have led to the opposite decision. The letter was written at the earnest solicitation of the girl's father and mother, and its contents were simply what they requested. In effect, therefore, he was but their amanuensis, at the utmost their agent; and their justification, which could not be questioned, was his. In the New York case of *Byam v. Collins*, 39 Hun, 204, the writer of a letter under similar circumstances was the intimate lady friend of the girl, and it was held not to be privileged. The privilege, said Bradley, J. "is afforded by the ties of consanguinity or kindred, and may arise out of other and various relations of interest, or which suggest duty to furnish information in respect

These are instances of a party speaking unmoved by the person to whom he speaks. His being thus moved will in some circumstances create a privilege not otherwise existing; as, where one answers an application for the character of a servant, made by another who contemplates employing him, already explained.¹

§ 305. **Other Illustrations** — are reports of legislative debates and proceedings, and comments thereon;² statements regarding the fitness of candidates for public office³ or for public school teaching,⁴ made properly and to proper persons; under due limitations, reports of judicial proceedings;⁵ communications by a mercantile agency to its patrons⁶ having an interest in the information;⁷ relevant communications in church discipline,⁸ and in the discipline of other voluntary associations,⁹ made within the rules governing the particular church or association; and, in general, properly conducted discussions, within just limits, of persons and things affecting the public interests, wherein also those speaking have interests of their own.¹⁰

to the conduct and character of another." p. 206. See further as to the principle, *Shurtleff v. Parker*, 130 Mass. 293; *Noonan v. Orton*, 32 Wis. 106; *Atwill v. Mackintosh*, 120 Mass. 177.

¹ Ante, § 127. Where the representation is voluntary, and the question of employing the servant is not depending, there is no protection. Over *v. Schiffing*, 102 Ind. 191. But the master of a discharged servant may, unsolicited, give such public notice as may be reasonable for the protection of his own interests; as, for example, against the collection of bills by such former servant. *Hatch v. Lane*, 105 Mass. 394. See, further, *Wennhak v. Morgan*, 20 Q. B. D. 635.

² *Wason v. Walter*, Law Rep. 4 Q. B. 73; *Davis v. Shepstone*, 11 Ap. Cas. 187.

³ 2 Bishop Crim. Law, § 937; *Briggs v. Garrett*, 1 Am. Pa. 404; *Express Printing Co. v. Copeland*, 64 Texas, 354; *Bays v. Hunt*, 60 Iowa, 251.

⁴ *Wieman v. Mabree*, 45 Mich. 484.

⁵ 2 Bishop Crim. Law, § 915; *Bathrick v. Detroit Post, &c. Co.* 50 Mich. 629; *Saunders v. Baxter*, 6 Heisk. 369; *Macdougall v. Knight*, 17 Q. B. D. 636; *Cowley v. Pulsifer*, 137 Mass. 392.

⁶ *Newbold v. Bradstreet*, 57 Md. 38; *Erber v. Dun*, 4 McCrary, 160; *Trussell v. Scarlett*, 18 Fed. Rep. 214; *Locke v. Bradstreet*, 22 Fed. Rep. 771. ⁷ *Sunderlin v. Bradstreet*, 46 N. Y. 188.

⁸ *York v. Johnson*, 116 Mass. 482; *Farnsworth v. Storrs*, 5 Cush. 412; *Over v. Hildebrand*, 92 Ind. 19; *Landis v. Campbell*, 79 Mo. 433, 437-440; *Fitzgerald v. Robinson*, 112 Mass. 371; *Servatius v. Pichel*, 34 Wis. 292.

⁹ *Kirkpatrick v. Eagle Lodge*, 26 Kan. 384; *Dawkins v. Autrobus*, 17 Ch. D. 615.

¹⁰ *Palmer v. Concord*, 48 N. H. 211; *Snyder v. Fulton*, 34 Md. 128; *Marks v. Baker*, 28 Minn. 162; *Neeb v. Hope*, 1 Am. Pa. 145; *Wilson v. Noonan*, 23

§ 306. **Limit of Protection — Malice.** — As already seen,¹ the protection does not cover a libel or slander not made in good faith, but of actual malice.² Any libellous or slanderous words, if not legally justifiable, are in our law language termed malicious; but the malice is then distinguished as malice in law, not in fact. Therefore, to sustain a suit, it need not be proved;³ though, in the absence of proof of malice, only compensatory damages⁴ can be recovered. But actual malice may be shown, if it exists, and thereupon the jury will be authorized to give punitive or exemplary damages.⁵ Such is the ordinary case, where there is no privilege. On the other hand, to sustain a suit where privilege is set up in defence, the plaintiff may and must, in rebuttal of it, prove malice in fact. Malice in law will not suffice, but malice in fact will overthrow the privilege.⁶

§ 307. *Fifthly. How the several Questions are to be determined:—*

To render More Distinct — the elucidations of this chapter, something will be said under the present head, but the procedure is not for this volume.

§ 308. **Court or Jury.** — The reader will find help from a section in the chapter on Malicious Prosecution.⁷ As to Slander and Libel, the matter is a little confused in the books, but

Wis. 105; Hetherington v. Sterry, 28 Kan. 426; Fisk v. Soniat, 33 La. An. 1400; Smith v. Higgins, 16 Gray, 251; Belo v. Wren, 63 Texas, 686; Miner v. Detroit Post, &c. Co. 49 Mich. 358; Terry v. Fellows, 21 La. An. 375; Wilson v. Fitch, 41 Cal. 363; Klinck v. Colby, 46 N. Y. 427.

¹ Ante, § 302.

² Ante, § 257.

³ Lick v. Owen, 47 Cal. 252; Neeb v. Hope, 1 Am. Pa. 145, 152; Maclean v. Scripps, 52 Mich. 214; Whitney v. Janesville Gazette, 5 Bis. 330; Zuckerman v. Sonnenschein, 62 Ill. 115; Wilson v. Noonan, 35 Wis. 321; Shipp v. Story, 68 Ga. 47; Farley v. Ranck, 5 Watts & S. 554; Shelton v. Simmons, 12 Ala. 466; Carlock v. Spencer, 2 Eng. 12.

⁴ Fry v. Bennett, 4 Duer, 247; Flint v. Clark, 13 Conn. 361.

⁵ Philadelphia, &c. Rld. v. Quigley, 21 How. U. S. 202, 213, 214; Lanius v. Druggist Pub. Co. 20 Mo. Ap. 12; Bergmann v. Jones, 94 N. Y. 51; Kinney v. Hosea, 3 Harring. Del. 397; Gilreath v. Allen, 10 Ire. 67.

⁶ Cases cited in the two preceding notes; Clark v. Molyneux, 3 Q. B. D. 237; Simpson v. Robinson, 12 Q. B. 511; Atwill v. Mackintosh, 120 Mass. 177, 183; Laughton v. Bishop of Sodor and Man, Law Rep. 4 P. C. 495, 505; Hart v. Gumpach, Law Rep. 4 P. C. 439; Fowles v. Bowen, 30 N. Y. 20; Marks v. Baker, 28 Minn. 162; Mielenz v. Quasdorf, 68 Iowa, 726.

⁷ Ante, § 240.

the following is believed to be the true doctrine. When the words and their accompanying facts are admitted, — as, for example, when the plaintiff's declaration is demurred to,¹ or there is a motion in arrest of judgment,² — the question whether or not they are actionable is purely for the court.³ Practically, in the trial of a cause, questions of fact on which the jury must necessarily pass blend with those of pure law; whereupon the judge tells them what the law is, as applied to each of the several contentions on the one side and on the other, and they find their verdict in view of the whole.⁴ Still some courts assimilate these civil cases to the criminal ones for libel, and do not say directly whether or not the words alleged are actionable, but define what the law requires and leave it to the jury to apply the definition to the case.⁵ Other courts say directly whether or not the words, supposing the plaintiff to have given them in his declaration their true meaning, are actionable.⁶ As to the —

§ 309. *Meaning.* — Though strictly the construction of words, whether oral or written, is for the court,⁷ one using them is responsible for their defamatory effect, either according to what he meant, or according to what the hearers understood him to mean, as already explained.⁸ Therefore evidence is admissible of how they were understood,⁹ and the jury may pass upon the meaning.¹⁰

¹ *Blunt v. Zuntz*, Anthon, 246; *Abrams v. Smith*, 8 Blackf. 95; *Edds v. Waters*, 4 Cranch C. C. 170.

² *Demarest v. Haring*, 6 Cow. 76.

³ *Boyd v. Brent*, 3 Brev. 241; *Blagg v. Sturt*, 10 Q. B. 899; *Neeb v. Hope*, 1 Am. Pa. 145; *Purdy v. Rochester Printing Co.* 96 N. Y. 372; *White v. Carroll*, 42 N. Y. 161; *Stace v. Griffith*, Law Rep. 2 P. C. 420; *Donaghue v. Gaffy*, 54 Conn. 257.

⁴ *Taylor v. Robinson*, 29 Maine, 323; *Parmiter v. Coupland*, 6 M. & W. 105; *Cooke v. Wildes*, 5 Ellis & B. 328.

⁵ *Parmiter v. Coupland*, *supra*; *Baylis v. Lawrence*, 11 A. & E. 920.

⁶ *Pittock v. O'Niell*, 13 Smith, Pa. 253.

⁷ *More v. Bennett*, 48 N. Y. 472.

⁸ *Ante*, § 277; *Wieman v. Mabee*, 45 Mich. 484.

⁹ *Knapp v. Fuller*, 55 Vt. 311; *De Armond v. Armstrong*, 37 Ind. 35; *McLaughlin v. Russell*, 17 Ohio, 475; *Morgan v. Livingston*, 2 Rich. 573. As to the limitation, see *Van Vechten v. Hopkins*, 5 Johns. 211.

¹⁰ *Dolloway v. Turrill*, 26 Wend. 383; *Watson v. Nicholas*, 6 Humph. 174; *Smith v. Miles*, 15 Vt. 245; *Usher v. Severance*, 20 Maine, 9; *Jones v. Rivers*, 3 Brev. 95; *Thompson v. Grimes*, 5 Ind. 385; *Cregier v. Bunton*, 2 Rich. 395; *Fray v. Fray*, 17 C. B. N. s. 603, 10 Jur. N. s. 1153.

§ 310. **Proof of Damage.** — Equally in libel as in slander,¹ if, in a case where neither special damage nor actual malice is relied upon, the plaintiff proves the defamation and no more, his action is not thrown out of court, but the jury may give him what they think he deserves.² Practically there is in most cases evidence in aggravation or mitigation of damages.³

§ 311. *The Doctrine of this Chapter restated.*

Words are a power in social life, and he who employs this power to the injury of another should respond in damages. Upon this fundamental principle the law of slander and libel rests. Under judicial hands it has been moulded into a form adapted to practical needs and use. The semi-technical law thus created consists chiefly in various distinctions resting partly on abstract reason, partly in usage, and partly on what is convenient in litigation. The leading distinctions are, that defamatory words are more damaging when written than when uttered orally, so that a higher degree of oral defamation than of written is required to sustain an action; that, when a certain degree of defamation is shown, the law presumes damage, and it need not be proved, but, on a less degree appearing, there must be proof of some particular damage; that one who uses words in the discharge of his legal or social duties is not responsible though they defame another, if he speaks cautiously, so as not needlessly to injure, and is without malice; but otherwise if he takes advantage of the occasion to carry out an evil purpose; and that, in determining what words are actionable and what are not, the law disregards the minuter and less important wrong, thus limiting its remedy to what is substantial in the combination of wrong and injury without which there can be no action. The minuter distinctions need not be here repeated.

¹ Ante, § 275.

² Sanderson v. Caldwell, 45 N. Y. 398; Price v. Whitely, 50 Mo. 439.

³ For example, as to wealth, Rea v. Harrington, 58 Vt. 181; Burckhalter v. Coward, 16 S. C. 435; Barber v. Barber, 33 Conn. 335; Trimble v. Foster,

87 Mo. 49. In other respects, Rearick v. Wilcox, 81 Ill. 77; Knox v. Commercial Agency, 40 Hun, 508; Hastings v. Stetson, 130 Mass. 76; Sowers v. Sowers, 87 N. C. 303. The subject is incidentally mentioned at various places throughout this chapter.

CHAPTER XVII.

DECEIT.

§ 312. Introduction.

313-317. In General.

318-321. As to what Things.

322-332. On what Representation.

333-337. What Believing and Acting on Representation.

338-342. Nature of Damage.

343. Doctrine of Chapter restated.

§ 312. **How Chapter divided.** — We shall consider, I. In General; II. As to what Things; III. On what Representation; IV. On what Believing and Acting upon the Representation; V. The Nature of the Damage.

I. *In General.*

§ 313. **Form of Action.** — Trespass on the case — called, for short, case — is the ordinary common-law action for the wrong to be considered in this chapter. But in some circumstances there may be a bill in equity; and it is a common defence to actions at law upon those contracts which it has vitiated. There are also other actions, such as *assumpsit*, for the recovering back of money deceitfully obtained. But what we are chiefly to consider in this chapter is that fraud which at common law would sustain an action on the case, “when,” as Comyns expresses it, “a man does any deceit to the damage of another.”¹

§ 314. **The Principles** — on which the doctrine of this chapter rests, are among those laid down in previous elucidations. The leading one is, that he who inflicts on another a legal

¹ Com. Dig. Action upon the Case for a Deceit, A, 1.

injury purposely,¹ and not in the lawful exercise of any right or duty, is liable in damages therefor.² The injury here to be considered, like that of the last chapter, comes from the wrongful communicating of an idea. The doctrine is that—

§ 315. **Defined.**—He who, either by express words, or by their equivalent in implication, conduct, or presumption, fraudulently³ deceives another into doing anything to his legal damage must, whether having an interest in the matter or having received a consideration connected with it or not, make good the loss.⁴ A leading element is the—

§ 316. **Evil Intent.**—Communications between men are a necessity, there can be no social existence without them. So that, on principles explained in a preceding chapter,⁵ whenever one honestly and circumspectly makes a statement to another who acts thereon, he is without responsibility should harm, which he did not mean, follow; it is one of the common and inevitable accidents of life. Therefore the essence of the wrong now to be considered consists in an evil intent, or conscious falsity;⁶ which, in this sort of case, ordinarily implies either a knowledge that the facts are not as represented, or a want of knowledge that they are.⁷ But it is not necessary that the intent should be to defraud the particular per-

¹ *Brooking v. Shinn*, 25 Mo. Ap. 277.

² *Ante*, § 143.

³ *Taylor v. Ashton*, 11 M. & W. 401, 415.

⁴ *Pasley v. Freeman*, 3 T. R. 51, 64; *Barry v. Croskey*, 2 Johns. & H. 1; *De May v. Roberts*, 46 Mich. 160; *Hart v. Tallmadge*, 2 Day, 381; *Ives v. Carter*, 24 Conn. 392; *Benton v. Pratt*, 2 Wend. 385; *Hubbard v. Briggs*, 31 N. Y. 518; *Nowlan v. Cain*, 3 Allen, 261; *Green v. Bryant*, 2 Kelly, 66; *Weatherford v. Fishback*, 3 Scam. 170; *Eames v. Morgan*, 37 Ill. 260; *Shaeffer v. Sleade*, 7 Blackf. 178; *Oldham v. Bentley*, 6 B. Monr. 428; *McAleer v. McMurray*, 8 Smith, Pa. 126; *White v. Merritt*, 3 Selden, 352; *Bean v. Herrick*, 3 Fairf. 262; *Lobdell v. Baker*, 1 Met. 193.

⁵ *Ante*, § 155-185.

⁶ *Polhill v. Walter*, 3 B. & Ad. 114, 123. Compare with *Kuhl v. Jersey City*, 8 C. E. Green, 84.

⁷ *Marshall v. Hubbard*, 117 U. S. 415; *Ramsey v. Riley*, 13 Ohio, 157; *Erie City Iron Works v. Barber*, 10 Out. Pa. 125; *Cox v. Highley*, 4 Out. Pa. 249; *Arthur v. Wheeler, & Co.* 12 Mo. Ap. 335; *Dunn v. White*, 63 Mo. 181; *Taylor v. Leith*, 26 Ohio State, 428, 434; *Dulaney v. Rogers*, 64 Mo. 201; *Stitt v. Little*, 63 N. Y. 427; *Shippen v. Bowen*, 4 McCrary, 59; *Young v. Covell*, 8 Johns. 23; *Cowley v. Dobbins*, 136 Mass. 401; *Taylor v. Ashton*, 11 M. & W. 401, 415; *Upton v. Vail*, 6 Johns. 181; *Holmes v. Caldwell*, 10 Rich. 311; *Clement v. Creditors*, 37 La. An. 692.

son in fact injured.¹ Nor need the primary purpose be to injure anybody; it may, for example, be to benefit one's self by a good bargain,² or to benefit another by procuring him credit,³ while the evil of the intent consists simply in a willingness to secure the good through the infliction of a wrong. Still,—

§ 317. **Things Combining.**—The evil intent alone does not create liability; another must have suffered, there must have been an act, it must have been the cause of the suffering, been of sufficient magnitude, and sufficiently proximate thereto.⁴ The required combination⁵ of things has been variously expressed; as, that the representations were untrue, were known to be untrue by the person making them, were calculated to induce the other to act upon them, and he did so act;⁶ or, that the party complained of made the representations, that they were false, were known by him to be so, were uttered with the intent to deceive the other into acting upon them, and that the other relied and acted on them, and suffered thereby an injury.⁷ We shall get a completer view of the elements of the combination, by travelling through the subject in the order already indicated; namely,—

II. *As to what Things.*

§ 318. **Any Accomplished Cheat — Damage.**—The rule that one cannot complain of another's wrong until he has suffered from it,⁸ precludes the maintaining of an action of deceit for a mere attempted cheat. Damage must combine with the fraud.⁹ But where this combination exists, there appears to be no limitation of the things, among those whereof the law takes cognizance, to which our present doctrine may

¹ *Boyd v. Browne*, 6 Barr, 310.

² *Routh v. Caron*, 64 Texas, 289.

³ *Scott v. Lara, Peake*, 226; *Tapp v. Lee*, 3 B. & P. 367.

⁴ *Ante*, § 22-48.

⁵ *Slade v. Little*, 20 Ga. 371; *Kimmans v. Chandler*, 13 Iowa, 327.

⁶ *Cox v. Highley*, 4 Out. Pa. 249.

⁷ *Marshall v. Hubbard*, 117 U. S. 415.

⁸ *Ante*, § 22.

⁹ *Upton v. Vail*, 6 Johns. 181; *Freeman v. McDaniel*, 23 Ga. 354; *Nye v. Merriam*, 35 Vt. 438; *Hanson v. Edgerly*, 9 Fost. N. H. 343; *Otis v. Raymond*, 3 Conn. 413.

be applied.¹ The words of Comyns have already been quoted, "any deceit to the damage of another."² Thus, —

§ 319. **Bargainings about Property.** — It extends to all deceitful — in other words, fraudulent — bargainings about property, whether real³ or personal;⁴ as, for example, where one sells a chattel concealing a defect which he ought to disclose,⁵ or falsely representing something concerning it,⁶ or practises a fraud in the sale of lands,⁷ or fraudulently misdescribes them,⁸ or sells non-existing lands,⁹ or lands to which he has no title,¹⁰ or sells as his own personal property in possession known by him to be another's,¹¹ or another's paid note as being a subsisting obligation.¹² Again, —

§ 320. **Misrepresentations as to Trustworthiness.** — A common form of this cheat is where one, to procure credit for another, represents him as responsible, knowing that he is not. Thereupon the person who, for example, sells him goods or lands on the faith of this representation, can, on its falsity appearing, recover his money of the one who made it.¹³ This is a branch of the law of deceit so liable to be abused that, in England, since

¹ *Allison v. Tyson*, 5 Humph. 449; *Howard v. Gould*, 28 Vt. 523; *Russell v. Clark*, 7 Cranch, 69, 89, 92.

² Ante, § 313.

³ *Ladd v. Pigott*, 114 Ill. 647; *Bish v. Van Cannon*, 94 Ind. 263; *Grier v. Dehan*, 5 Houst. 401; *Phinney v. Hubbard*, 2 Wash. Ter. 369.

⁴ *Buzard v. Houston*, 119 U. S. 347; *Routh v. Caron*, 64 Texas, 289; *Cole v. Cassidy*, 138 Mass. 437.

⁵ *Paddock v. Strobbridge*, 29 Vt. 470; *Thompson v. Morris*, 5 Jones, N. C. 151; *Marsh v. Webber*, 13 Minn. 109; *Lunn v. Shermer*, 93 N. C. 164.

⁶ *Plant v. Condit*, 22 Ark. 454; *Ad-dington v. Allen*, 11 Wend. 374; *Baldwin v. West*, *Hardin*, 54; *Mizell v. Sims*, 39 Missis. 331; *Houston v. Gilbert*, 3 Brev. 63; *Drake v. Grant*, 36 Hun, 464; *Stevens v. Fuller*, 8 N. H. 463.

⁷ *Culver v. Avery*, 7 Wend. 380; *Wade v. Thurman*, 2 Bibb, 583; *Strong v. Peters*, 2 Root, 93; *Harlow v. Green*,

34 Vt. 379; *Ekins v. Tresham*, 1 Lev. 102; *Monell v. Colden*, 13 Johns. 395; *Martin v. Jordan*, 60 Maine, 531.

⁸ *Clark v. Baird*, 5 Selden, 183; *Davis v. Bowland*, 2 J. J. Mar. 27.

⁹ *Wardell v. Fosdick*, 13 Johns. 325.

¹⁰ *Culver v. Avery*, 7 Wend. 380; *Whitney v. Allaire*, 1 Comst. 305.

¹¹ *Ludlow v. Kidd*, 4 Ohio, 244; *Roswel v. Vaughan*, Cro. Jac. 196, 197; *Furnis v. Leicester*, Cro. Jac. 474; *Turner v. Brent*, 12 Mod. 245; *Cross v. Gardner*, 1 Show. 68; s. c. nom. *Cross v. Garnet*, 3 Mod. 261.

¹² *Williams v. Bates*, 15 Neb. 565.

¹³ *Pasley v. Freeman*, 3 T. R. 51; *Haycraft v. Creasy*, 2 East, 92; *Upton v. Vail*, 6 Johns. 181; *Harrison v. Savage*, 19 Ga. 310; *Bennett v. Terrill*, 20 Ga. 83; *Zabriskie v. Smith*, 3 Kernan, 322; *Corbett v. Gilbert*, 24 Ga. 454; *Anderson v. McPike*, 86 Mo. 293; *Pat-ten v. Gurney*, 17 Mass. 182; *Lord v. Goddard*, 13 How. U. S. 198; *Tryon v. Whitmarsh*, 1 Met. 1.

1829, this sort of representation, to be a ground of action, has by statute been required to be in writing.¹ And a like provision has been introduced into the statutes of some of our States.²

§ 321. **Other Forms** — of this cheat are paying an agreed price in counterfeits, whereupon an action of deceit will lie to recover the price ;³ delivering counterfeit bonds, instead of the genuine ones which were bargained to be furnished ;⁴ winning another's money with false dice,⁵ or purposely in a horse-race riding against a competing horse ;⁶ borrowing a safe with a combination lock, and returning it locked on a combination which the borrower refuses to disclose, so rendering it worthless ;⁷ a physician taking with him a non-professional unmarried man without necessity, to be present at a confinement case, and passing him off as a medical man ;⁸ a dealer selling one a gun which he fraudulently represents to be safe when it is not, to be used by several persons, and one of them uses it and is injured,⁹ — these, it should be remembered, are but illustrations of frauds numberless in form, and pervading the entire body of our social existence.

III. *On what Representation.*

§ 322. **Analogous.** — The doctrines of this sub-title and the next are analogous to corresponding ones in the criminal law of cheating by false pretences,¹⁰ an examination whereof will be helpful here.

§ 323. **Differences of Opinion.** — There are slight judicial differences as to some particulars within this sub-title. Yet, on the whole, the discords are not great ; and, looking at the

¹ 9 Geo. 4, c. 14, § 6 ; *Haslock v. Fergusson*, 7 A. & E. 86 ; *Lyde v. Barnard*, 1 M. & W. 101 ; *Swann v. Phillips*, 8 A. & E. 457.

² *Norton v. Huxley*, 13 Gray, 285 ; *Hearn v. Waterhouse*, 39 Maine, 96 ; *Kimball v. Comstock*, 14 Gray, 508 ; *Mann v. Blanchard*, 2 Allen, 386 ; *Bush v. Sprague*, 51 Mich. 41.

³ *Lane v. Hogan*, 5 Yerg. 290.

⁴ *Shippen v. Tankersley*, 4 McCrary, 259.

⁵ *Harris v. Bowden*, 1 Cro. Eliz. 90.

⁶ *McKay v. Irvine*, 11 Bis. 168.

⁷ *Neff v. Webster*, 15 Wis. 233.

⁸ *DeMay v. Roberts*, 46 Mich. 160.

⁹ *Langridge v. Levy*, 2 M. & W. 519, affirmed 4 M. & W. 337. See *Carter v. Harden*, 78 Maine, 528.

¹⁰ 2 Bishop Crim. Law, § 415-475.

legal reasons as guides to the better doctrine, we may outline it thus, —

§ 324. **Doctrine Defined.** — The doctrine of this sub-title is, that the representation must be of some existing fact, in distinction from an opinion, a promise, or an assumed future fact; that the sort of thing represented is immaterial, except that it must be of a nature and magnitude having some adaptability to accomplish the fraud; and that it must be false, and made with a fraudulent purpose, which includes a consciousness of falsity,¹ such as the knowledge that it is false, a want of knowledge that it is true, or an indifference whether it is true or false. To particularize, —

§ 325. **Present Fact — (Opinion — Future Fact).** — An opinion is a mere condition of the mind that entertains it. Necessarily and properly it guides that particular mind, but not the mind of another person. It is the prime law of our being that each individual should and must follow his own opinions; and a municipal law recognizing any claim in one man to lead another by his views, or right in the other to follow them where contrary to his own, would be a reprehensible attempt to overturn a fundamental law in nature. Therefore the expression of a mere opinion, however false or fraudulently meant, can never be the foundation of an action of deceit.² The representation must be of a fact,³ though it will not become inadequate should opinion be mingled with it. And it is sometimes a nice question whether or not a particular representation goes beyond opinion and includes fact. One's saying that he or another is "a person safely to be trusted and given credit to" may be opinion within our rule;⁴ while, on the other hand, the possession of property or income which constitutes the ability to pay is a fact, in which view the false

¹ *Wakeman v. Dalley*, 51 N. Y. 27, 35. *v. Crawford*, 7 Bradw. 29; *Banta v. Savage*, 12 Nev. 151.

² *Pasley v. Freeman*, 3 T. R. 51, 57; *Curry v. Keyser*, 30 Ind. 214; *Drake v. Latham*, 50 Ill. 270; *Hubbell v. Meigs*, 50 N. Y. 480, 489; *Mooney v. Miller*, 102 Mass. 217; *Ellis v. Andrews*, 56 N. Y. 83; *American Ins. Co. v. Sieveking v. Litzler*, 31 Ind. 13; *Rowell v. Chase*, 61 N. H. 135.

⁴ *Lyons v. Briggs*, 14 R. I. 222; *Haycraft v. Creasy*, 2 East, 92, 105; *Horrigan v. First Nat. Bank*, 9 Baxter, 137.

statement that a person is good for a debt is sufficient in fraud.¹ Adequate assertions of fact, when accompanied by the other necessary circumstances, are, that a mortgage offered is on a large two-story house, when it is on a small story and a half one;² that land, situated at a distance where the intending purchaser cannot examine it, is more in quantity and improvements than it is truly;³ that a farm, offered for sale in the winter when covered by snow, produces more hay and feeds more cattle than it does, and is free from rocks when it is not.⁴ Since the future is veiled from sight, any statement of a future fact is necessarily to be treated as mere opinion.⁵

§ 326. **Promise.** — Commonly a promise is not a representation within our present doctrine; if it were, every breach of an agreement might be treated as a deceit.⁶ At the same time, there may be combinations of things which, being numerous and diverse, it would not be easy to reduce to a rule, wherein a promise is an element, even a leading one, in bringing about a fraud which the court will redress.⁷

§ 327. **Price and Value.** — It is immaterial to any bargaining about a thing what the person offering it gave for it.⁸ Therefore a seller's false representation of what he paid for the property is not an actionable fraud.⁹ Value is different; still it is ordinarily to be treated in the same way, because matter of opinion.¹⁰ But where the representation of value

¹ *Cain v. Dickenson*, 60 N. H. 371; *Money*, 5 H. L. Cas. 185; *Fenwick v. Fooks v. Waples*, 1 Harring. Del. 131; *Cowley v. Smyth*, 17 Vroom, 380; *Newell v. Randall*, 32 Minn. 171; *Weil v. Schwartz*, 21 Mo. Ap. 372; *Buzard v. Houston*, 119 U. S. 347; *Morse v. Shaw*, 124 Mass. 59.

² *Bradbury v. Haines*, 60 N. H. 123.

³ *Ladd v. Pigott*, 114 Ill. 647.

⁴ *Rhoda v. Annis*, 75 Maine, 17.

⁵ 2 Bishop Crim. Law, § 420; *Morrison v. Koch*, 32 Wis. 254; *Pedrick v. Porter*, 5 Allen, 324, 326.

⁶ *Gray v. Palmer*, 2 Rob. N. Y. 500; *Loupe v. Wood*, 51 Cal. 586; *Farrington v. Bullard*, 40 Barb. 512; *Holmes v. Caldwell*, 10 Rich. 311; *Jorden v.*

Money, 5 H. L. Cas. 185; *Fenwick v. Grimes*, 5 Cranch C. C. 439; *Crosier v. Acer*, 7 Paige, 137; *Farrar v. Bridges*, 3 Humph. 566; *Fisher v. New York Com. Pl.* 18 Wend. 608.

⁷ *Cockrill v. Hall*, 65 Cal. 326; *Wilson v. Eggleston*, 27 Mich. 257; *Kinard v. Hiers*, 3 Rich. Eq. 423; *Richardson v. Adams*, 10 Yerg. 273.

⁸ *Pettijohn v. Williams*, 2 Jones, N. C. 33.

⁹ *Richardson v. Noble*, 77 Maine, 390; *Hemmer v. Cooper*, 8 Allen, 334; *Medbury v. Watson*, 6 Met. 246, 259, 260. See *Van Epps v. Harrison*, 5 Hill, N. Y. 63.

¹⁰ *Sandford v. Handy*, 23 Wend. 260;

goes beyond opinion into fact, and it is false, it is an actionable fraud.¹

§ 328. **Adaptability.** — In the criminal law of false pretences, the pretence must be of a sort and magnitude having some adaptability to accomplish the cheat, as applied to the particular mind to be defrauded.² And a like view has been entertained regarding the false representation we are now considering.³ It is but a plain proposition that the cheat must be caused by the misrepresentation,⁴ and we cannot well look upon that as a cause which has no aptitude to produce the effect. This proposition is believed to mark the extent of the present doctrine.

§ 329. **Fraudulent.** — We have already seen that the representation must be the outflow of evil in the mind; that is, it must be a purposed falsity, meant or adapted to injure another.⁵ It need not be specifically to harm the particular person;⁶ for example, misstatements made to a commercial agency are adequate, being intended to entrap any one who consults its books and relies on them.⁷ So, if a railroad company publishes a false time-table, the falsity being presumably known to its agents, and therefore to it, all intending travellers are within the scope of the fraud, and whoever suffers loss by going to the depot for a particular advertised train which does not run may maintain against the company his action for the deceit.⁸

§ 330. **The Falsity.** — The representation must be, in fact,

Harvey v. Young, Yelv. 21 a; *Holdom v. Ayer*, 110 Ill. 448; *Cronk v. Cole*, 10 Ind. 485; *Dupont v. Payton*, 2 E. D. Smith, 424; *Picard v. McCormick*, 11 Mich. 68; *Bourn v. Davis*, 76 Maine, 223, 225; *Kimball v. Bangs*, 144 Mass. 321.

¹ *Manning v. Albee*, 11 Allen, 520; *Simar v. Canaday*, 53 N. Y. 298; *Burr v. Willson*, 22 Minn. 206.

² 2 Bishop Crim. Law, § 433-436, 458.

³ *Polhill v. Walter*, 3 B. & Ad. 114, 123.

⁴ Ante, § 37-39; *Parker v. Arm-*

strong, 55 Mich. 176; *Oberlander v. Spiess*, 45 N. Y. 175.

⁵ Ante, § 316; *Pier v. Hanmore*, 86 N. Y. 95; *Pier v. George*, 86 N. Y. 613; *British Mut. Banking Co. v. Charnwood Forest Ry.* 18 Q. B. D. 714; *Walsh v. Morse*, 80 Mo. 568; *Erie City Iron Works v. Barber*, 10 Out. Pa. 125; *Thom v. Bigland*, 8 Exch. 725; *Stimson v. Helps*, 9 Colo. 33.

⁶ Ante, § 316.

⁷ *Genesee Sav. Bk. v. Michigan Barge Co.* 52 Mich. 164.

⁸ *Denton v. Great Northern Ry.* 5 Ellis & B. 860; post, § 1059.

false.¹ Beyond which, it is sometimes loosely said that the person making it must know it to be so.² But by the adjudged law, both in England and in the United States, such affirmative knowledge is not indispensable,³ if there is otherwise bad faith;⁴ as, for example, if he merely believed it to be false, or even if he had simply good reason so to believe, or if he stated the thing as of his own knowledge when he did not know,⁵ or if he spoke recklessly where it was his duty to be careful and accurate.⁶ Yet in the absence of bad faith, this sort of false statement will not charge the party;⁷ as, if he says he personally knows a thing whereof it is impossible he should have personal knowledge, interpreted to be only a strong belief of its truth;⁸ or, if he makes any other statement which in terms is fact, but by the subject and surroundings is rendered opinion.⁹

§ 331. Meant to be Acted on.—From the foregoing doctrines is deducible another; namely, that the representation, to be a deceit, must be made with the view of being acted upon.¹⁰ Otherwise it would be a mere lie, and no fraud.

§ 332. Need not be Words.—Though commonly the representation is by oral or written words, it may be by any other manner of conveying the idea; as, for example, by acts and

¹ *Parker v. Armstrong*, 55 Mich. 176.

² *Wharf v. Roberts*, 88 Ill. 426.

³ *Taylor v. Ashton*, 11 M. & W. 401.

⁴ *Ormrod v. Huth*, 14 M. & W. 651; *The State v. Meyer*, 2 Mo. Ap. 413; *Craig v. Ward*, 1 Abb. Ap. 454; *Polhill v. Walter*, 3 B. & Ad. 114, 123; *Taylor v. Leith*, 26 Ohio State, 428, 434.

⁵ *Wakeman v. Dalley*, 51 N. Y. 27; *Marsh v. Falker*, 40 N. Y. 562; *Stitt v. Little*, 63 N. Y. 427; *Morehouse v. Yeager*, 71 N. Y. 594; *McKown v. Furgason*, 47 Iowa, 636; *Caldwell v. Henry*, 76 Mo. 254; *Cabot v. Christie*, 42 Vt. 121; *Morse v. Dearborn*, 109 Mass. 593; *Litchfield v. Hutchinson*, 117 Mass. 195; *Meyer v. Amidon*, 45 N. Y. 169.

⁶ *Parmlee v. Adolph*, 28 Ohio State,

10, 21; *Evans v. Edmonds*, 13 C. B. 777, 786; *Reese River, &c. Co. v. Smith*, Law Rep. 4 H. L. 64; *Cooper v. Schlesinger*, 111 U. S. 148, 155.

⁷ *Dunn v. White*, 63 Mo. 181; *Dulaney v. Rogers*, 64 Mo. 201; *Evans v. Collins*, 5 Q. B. 804; *Bowker v. Delong*, 141 Mass. 315; *Cowley v. Smyth*, 17 Vroom, 380; *Weed v. Case*, 55 Barb. 534.

⁸ *Tucker v. White*, 125 Mass. 344; *Hubbell v. Meigs*, 50 N. Y. 480, 488.

⁹ *Russell v. Clark*, 7 Cranch, 69, 93; *Duffany v. Ferguson*, 66 N. Y. 482.

¹⁰ *Behn v. Kemble*, 7 C. B. N. s. 260; *Taylor v. Scoville*, 54 Barb. 34; *Watson v. Poulson*, 15 Jur. 1111, 1112; *Wells v. Cook*, 16 Ohio State, 67; *McCracken v. West*, 17 Ohio, 16; *Macullar v. McKinley*, 99 N. Y. 353, 357.

conduct.¹ Thus, if a physician takes with him a man to assist in a confinement case, he thereby, by implication, represents him to be of the medical profession.² Or, if a man, saying nothing, secretly loosens the shoe of a horse, to make the owner believe that the horse-shoer is not fit to be trusted with the work, and the device succeeds, it is an actionable deceit.³ So, silence is a representation where there is a legal duty to speak, not where there is none.⁴

IV. *On what Believing and Acting upon the Representation.*

§ 333. **Cause and Effect.** — The representation and the accomplished cheat must sustain to each other the relation of cause and effect.⁵ This implies that the person relies on the representation,⁶ having the right to rely thereon;⁷ and, as the expression sometimes is, “alters his condition” by reason thereof.⁸ Hence, —

§ 334. **Own Judgment.** — If one, looking into the facts, acts upon what they disclose to his own understanding, and not upon the representation, there is no deceit.⁹ And, —

§ 335. **Believed.** — It is the same where he does not believe the representation;¹⁰ for one cannot be misled by that to which he gives no credence. Still, —

§ 336. **Other Influences Contributing.** — It is no objection that other influences co-operate with the misrepresentation,¹¹ if, without it, the thing would not be done.¹²

¹ 2 Bishop Crim. Law, § 430.

² De May v. Roberts, 46 Mich. 160.

³ Hughes v. McDonough, 14 Vroom, 459.

⁴ Wood v. Amory, 105 N. Y. 278; Jordan v. Pickett, 78 Ala. 331; Babcock v. Libbey, 82 N. Y. 144; Brown v. Gray, 6 Jones, 103; Paddock v. Strobbridge, 29 Vt. 470; Otis v. Raymond, 3 Conn. 413.

⁵ Ante, § 37-39; Schanck v. Morris, 7 Rob. N. Y. 658; Reynolds v. French, 11 Vt. 674; Oberlander v. Spiess, 45 N. Y. 175; Macullar v. McKinley, 99 N. Y. 353.

⁶ Hagee v. Grossman, 31 Ind. 223;

Fuller v. Robinson, 86 N. Y. 306; Gormely v. Milwaukee Gymn. Assoc. 55 Wis. 350; Atkins v. Elwell, 45 N. Y. 753, 761.

⁷ Schoelkopf v. Leonard, 8 Colo. 159; Cronk v. Cole, 10 Ind. 485.

⁸ Ming v. Woolfolk, 116 U. S. 599.

⁹ Port v. Williams, 6 Ind. 219;

Haight v. Hayt, 19 N. Y. 464.

¹⁰ Clopton v. Cozart, 13 Sm. & M. 363; Bowman v. Carithers, 40 Ind. 90.

¹¹ Ante, § 39; Shaw v. Stine, 8 Bosw. 157.

¹² 2 Bishop Crim. Law, § 424, 461; Addington v. Allen, 11 Wend. 374.

§ 337. **Blindly Misled.** — That the defrauded party is too credulous, and blindly misled, may perhaps, in some extreme cases, be a defence to this action,¹ but it is not always or generally so.² The true principle is believed to be, that the test of the representation is its actual effect on the particular mind, whether it is a strong and circumspect one or one weak and too relying.³

V. *The Nature of the Damage.*

§ 338. **Must be Actual.** — We saw in the last chapter that in slander and libel the law, without specific proof, ordinarily imputes damage.⁴ The rule in deceit would not be different if the two cases were alike. But injury as of course follows words actionable *per se*, they take effect upon the character; on the other hand, a false representation made with the view to cheat a person does not injure him unless or until he is cheated. So the doctrine is, as already said,⁵ that the right to complain of a deceit does not arise until the party has suffered an actual damage.⁶ Thus, —

§ 339. **Illustrations.** — If one by fraud is led to indorse a promissory note, he cannot maintain this action until he has paid it; for, until then, there is no certainty that the maker will not pay.⁷ A person who interferes fraudulently with what another contemplates, and intercepts anticipated profits, where no actual contract has been made, does not inflict a damage which will sustain this action;⁸ but, where the deceit brings about a breach of contract, the consequence is otherwise.⁹ If one fraudulently uses another's trademark, and actually sells goods with it upon them, as being the manufacture of the proprietor of the trademark, sufficient legal damage appears, though nothing more specific is shown. The right is injured.¹⁰

¹ Frenzel v. Miller, 37 Ind. 1; Jordan v. Pickett, 78 Ala. 331.

² Caldwell v. Henry, 76 Mo. 254; Mead v. Bunn, 32 N. Y. 275; Donelson v. Young, Meigs, 155.

³ 2 Bishop Crim. Law, § 433-436.

⁴ Ante, § 270, 271, 275, 284, 310.

⁵ Ante, § 318.

⁶ Wemple v. Hildreth, 10 Daly, 481;

Hagood v. Southern, 117 U. S. 52.

⁷ Freeman v. Venner, 120 Mass. 424.

⁸ Dudley v. Briggs, 141 Mass. 582.

⁹ Lumley v. Gye, 2 Ellis & B. 216.

¹⁰ Blofeld v. Payne, 4 B. & Ad. 410,

§ 340. **The Amount of Damage** — is the actual loss.¹ For example, one who has been induced by another's deceit to sell goods to an insolvent person can recover of the former their value;² or, who, through another's representation that a note is unpaid, when in fact it is paid, buys it, can have back the full amount.³

§ 341. **Damage against Law.** — Where the case is such that the giving of damages would violate a rule of law, the action itself is not maintainable. Thus, if a justice of the peace is by false representations induced to marry an infant, and is prosecuted and fined therefor, it has been deemed that he cannot recover the amount of the fine in an action of deceit, because the loss was "by his own wrongful conduct."⁴ Upon ordinary principles of the criminal law, there could be no punishment where the magistrate thus acted from an innocent mistake of fact; and there are analogies justifying a doubt of the correctness of refusing him redress, assuming him to have acted under the honest and carefully formed belief that the person was of age.⁵ In accord with which view, the buyer of liquors sold by an unlicensed person in violation of a statute making the sale penal, may maintain an action for a deceit in the sale, if, when he bought them, he was not aware that the seller had no license.⁶ There are within this doctrine cases wherein a recovery will be prevented by some unreversed —

§ 342. **Action of a Court.** — One who has had a decree in chancery, or a judgment in a suit at common law, rendered against him because of perjured evidence, cannot maintain an action against the witness; for, to suffer this would be to violate the wholesome rule of law that parties cannot litigate the same thing at the same time through two separate proceedings,⁷

411; *Sykes v. Sykes*, 3 B. & C. 541. And see *Marsh v. Billings*, 7 Cush. 322; *Thomson v. Winchester*, 19 Pick. 214.

¹ *Tuckwell v. Lambert*, 5 Cush. 23.

² Ante, § 320; *Bean v. Wells*, 28 Barb. 466; *Rheem v. Naugatuck Wheel*

Co. 9 Casey, Pa. 356; *Kidney v. Stoddard*, 7 Met. 252.

³ *Sibley v. Hulbert*, 15 Gray, 509, 511; *Neff v. Clute*, 12 Barb. 466.

⁴ *Harvey v. Bush*, 2 Penning. 975.

⁵ Ante, § 56; *Bishop Con.* § 481.

⁶ *Prescott v. Norris*, 32 N. H. 101.

⁷ Ante, § 246.

and the other rule,¹ that a judgment cannot be collaterally attacked or opened.²

§ 343. *The Doctrine of this Chapter restated.*

Whenever one injures another by wrongful conduct of whatever sort, the law compels him to repair the injury by paying damages. And one form of injuring a man is to cheat him. To take from him a chattel by a cheat is no less a wrong in morals or in law than to carry it away by trespass. And to cheat him out of anything else of value, or otherwise to harm him by a cheat, is equally a wrong. To constitute a cheat, some representation of some pretended fact, of a sort adapted to influence the mind acted upon, must be so set before it and be such in its semblance that it will be in truth a falsity, yet appear to such mind a reality, will be the inducement to an act injurious to the person or to his property, and will result in actual damage. When these several things combine, there is a cheat of the sort we have been considering. Outside of the lines thus drawn, there are various semblances of cheats which are not such in law. And within the wide doctrine thus outlined, there are various minor doctrines, recognized by reason and by the courts, the chief of which are stated in this chapter. The common-law action for this cheat is termed an action of deceit, and from this fact Deceit becomes an appropriate title for the chapter.

¹ Allen v. Hickson, 1 Halst. 409 ; Curtis v. Fairbanks, 16 N. H. 542, 544, Morris v. Halbert, 36 Texas, 19. 545 ; Dunlap v. Glidden, 31 Maine, 435 ;

² Peck v. Woodbridge, 3 Day, 30 ; Cunningham v. Brown, 18 Vt. 123.

CHAPTER XVIII.

SLANDER OF TITLE.

§ 344. **Relations of Subject.** — The subject of this chapter is in some degree analogous to that of the slander or libel of one in his business.¹ But slander, whether oral or written, is a defamation of character, either general, or in respect of some particular quality; and business capacity, integrity, or method is one of the qualities. It is an injury to the person. What we are now to consider is injury to the property. And it is an injury committed, not by trespass, but by a fraud or deceit, substantially within the principles of the last chapter.

§ 345. **Name — Old Law.** — It is of little consequence how the somewhat misleading legal name of this wrong originated. It is believed to be as follows. In early times real estate was the leading subject of ownership; and it was not protected, as it is now in the United States, by registry laws. Thereupon, if an owner was about to sell or lease land, a third person speaking falsely about his title might practically prevent the transaction. And if such third person did this maliciously, and a damage to the owner followed, an action on the case, such as that for deceit mentioned in the last chapter, would lie against him.² But if the third person believed himself to have title, and spoke for the protection of his own interests, though in truth he had none, he incurred no liability;³ the injury received by the other being one of the common accidents of life, explained in a preceding chapter.⁴ In reason,

¹ Ante, § 284.

³ Gerard v. Dickenson, 4 Co. 18 a;

² Northumberland v. Byrt, Cro. Jac. Penniman's Case, Sir F. Moore, 410, 1 163; Smead v. Badley, Cro. Jac. 397; Cro. Eliz. 427.

Williams's Case, 2 Leon. 111.

⁴ Ante, § 176-184.

this just doctrine applied as well to anything else as to title ; the courts so held afterward, thus extending the law ;¹ but the name could not be a subject of adjudication, so it was not changed. And still the additions are not always in our books called by the old name. Certainly the one compact whole should not be divided into parts simply because of a name ; it would be better, if necessary, to find a new name. And it accords sufficiently well with usage to continue the old name equally as to the old ground and as to its accretions.

§ 346. **Defined.** — If one falsely and maliciously, and not for the protection of his own interests, by defaming the title, the property itself, or any other legal interest of another, brings damage upon him, he must make good the loss.² Carrying in our minds the principles of the last chapter, we need only look into a few particulars here ; thus —

§ 347. **Thing Defamed.** — The doctrine is believed to be entirely broad, that, not only the title to real estate, but the property itself, and all personal chattels, things in action, and whatever else can be owned, is matter to which the slander of this chapter may attach. As subjects of it, for example, may be mentioned a dinner,³ artificial manure,⁴ tulips,⁵ a statue,⁶ a copyright,⁷ a trademark,⁸ the title to land,⁹ even to land in another State,¹⁰ a lease of land,¹¹ a bond,¹² shares of stock,¹³ ore,¹⁴ a patent right,¹⁵ a ship,¹⁶ a race-horse ;¹⁷ and the author is not aware of any case wherein any species of

¹ *Wren v. Weild*, Law Rep. 4 Q. B. 730, 734.

² *Western Count. Manure Co. v. Lawes Chem. Manure Co.* Law Rep. 9 Ex. 218.

³ *Dooling v. Budget Pub. Co.* 144 Mass. 258.

⁴ *Western Count. Manure Co. v. Lawes Chem. Manure Co.* Law Rep. 9 Ex. 218.

⁵ *Gutsole v. Mathers*, 1 M. & W. 495.

⁶ *Gott v. Pulsifer*, 122 Mass. 235.

⁷ *Swan v. Tappan*, 5 Cush. 104 ; *Hart v. Wall*, 2 C. P. D. 146.

⁸ *McElwee v. Blackwell*, 94 N. C. 261. See *Day v. Brownrigg*, 10 Ch. D. 294.

⁹ *McDaniel v. Baca*, 2 Cal. 326 ; *Linden v. Graham*, 1 Duer, 670 ; *Pitt v. Donovan*, 1 M. & S. 639.

¹⁰ *Dodge v. Colby*, 108 N. Y. 445.

¹¹ *Brook v. Rawl*, 4 Exch. 521.

¹² *Robertson v. McDougall*, 4 Bing. 670.

¹³ *Malachy v. Soper*, 3 Bing. N. C. 371.

¹⁴ *Rowe v. Roach*, 1 M. & S. 304.

¹⁵ *Evans v. Harlow*, 5 Q. B. 624 ; *Wren v. Weild*, Law Rep. 4 Q. B. 730 ; *Young v. Macrae*, 3 Best & S. 264.

¹⁶ *Casey v. Arnott*, 2 C. P. D. 24 ; *Ingram v. Lawson*, 6 Bing. N. C. 212.

¹⁷ *Wilson v. Dubois*, 35 Minn. 471.

property has been adjudged to be outside of the present doctrine.

§ 348. **False and Malicious.**—The words complained of must be both false and, in legal phrase, malicious;¹ “malicious” signifying, as once explained by a learned judge, “with intent to injure” the party;² or it may mean simply injurious and without legal occasion,³ or that the false words were uttered *mala fide*.⁴

§ 349. **Fact, not Opinion.**—As in the cheat of the last chapter, the injurious words must declare a fact, not a mere opinion of the speaker.⁵ For example, where there were two rival ferries, and a person diverted travellers from the one to the other by telling them that the former was not so good as the latter, the owner thus deprived of custom was held not entitled to maintain an action against him.⁶

§ 350. **Damage.**—The damage implied by law does not suffice in these cases;⁷ actual damage must be sustained, and it must be alleged and proved.⁸ For example, it is not actionable to publish of a caterer’s dinner that it was “wretched,” that “even hungry barbarians might justly object,” and that the cigars were “vile” and the wines “not much better,” unless the caterer suing shows some special damage sustained therefrom.⁹

§ 351. **Justification — (Own Interests).**—This doctrine does not deprive a man of any proper looking out for his own in-

¹ Ante, § 231, 232, 257, 306; Hatchard v. Mege, 18 Q. B. D. 771, 775.

² Pater v. Baker, 3 C. B. 831, 868, Maule, J.; Hargrave v. Le Breton, 4 Bur. 2422; Steward v. Young, Law Rep. 5 C. P. 122; Smith v. Spooner, 3 Taunt. 246; Kendall v. Stone, 1 Selden, 14; Dodge v. Colby, 37 Hun, 515; Stark v. Chitwood, 5 Kan. 141.

³ Western Count. Manure Co. v. Lawes Chem. Manure Co. Law Rep. 9 Ex. 218, 223.

⁴ Brook v. Rawl, 4 Exch. 521, 524; Atkins v. Perrin, 3 Fost. & F. 179; Wren v. Weild, Law Rep. 4 Q. B. 730, 735, 736; Steward v. Young, Law Rep. 5 C. P. 122; Pitt v. Donovan, 1 M. &

S. 639, 645, 648; Kendall v. Stone, 2 Sandf. 269.

⁵ Crush v. Crush, Yelv. 80.

⁶ Johnson v. Hitchcock, 15 Johns. 185.

⁷ Ante, § 338.

⁸ Gresham v. Grinsley, Yelv. 88; Gerrard v. Dickenson, 1 Cro. Eliz. 196, 197; Law v. Harwood, Cro. Car. 140; Tasburgh v. Day, Cro. Jac. 484; Swan v. Tappan, 5 Cush. 104; Stark v. Chitwood, 5 Kan. 141; Fen v. Dixie, W. Jones, 444; Evans v. Harlow, 5 Q. B. 624; Malachy v. Soper, 3 Bing. N. C. 371; Wilson v. Dubois, 35 Minn. 471.

⁹ Dooling v. Budget Pub. Co. 144 Mass. 258.

terests¹ or managing his own business.² If, for example, he honestly claims as his own what another is about to sell,³ or thus claims that an article in the market is a violation of his patent,⁴ or if the title to the thing is involved in a suit pending in court,⁵ he may and should give intending purchasers proper warning. And what he may thus do for himself his attorney may do for him.⁶ But he cannot use this right as a mere cloak for malice, he must act in good faith.⁷

§ 352. *The Doctrine of this Chapter restated.*

“Live and let live,” while a familiar maxim in the ethics of life, is also a part of the law. One may pursue his own interests, but he has no right to interfere with those of another; he may make his own ownership valuable, but not impair the value of another’s. Therefore if, not in the honest pursuit of his own good, but to dishonestly benefit himself or harm another, a man utters, either verbally or in writing, any defamatory words of another’s property, title, or other legal interest, adapted to bring loss to the other, and a legal loss or damage does in fact follow, he subjects himself to the action technically termed slander of title. But without actual damage, no derogatory words uttered of property or title will sustain a suit; nor will actual damage suffice if, in the absence of malice, it results to another from what one does or says in the honest pursuit of his own interests.

¹ Ante, § 345; *Smith v. Spooner*, 3 Taunt. 246.

² *Swan v. Tappan*, 5 Cush. 104.

³ *Hill v. Ward*, 13 Ala. 310; *McDaniel v. Baca*, 2 Cal. 326.

⁴ *Halsey v. Brotherhood*, 19 Ch. D. 386.

⁵ *Thompson v. White*, 70 Cal. 135.

⁶ *Watson v. Reynolds*, Moody & M. 1.

⁷ *Wren v. Weild*, Law Rep. 4 Q. B. 730.

CHAPTER XIX.

CONSPIRACY.

§ 353. **Nature and Complications of Subject.** — There is no word more abused in our common-law books than “conspiracy.” It is often loosely applied to an indefinite part of the civil and criminal wrongs wherein two or more persons participate, whether the participation is attended by any special consequences or not, — properly if it is so attended, and improperly if it is not. For example, if two combine to commit an offence of a sort which one can just as well perpetrate alone, and fail, their act, which is truly an attempt, and which would be called such if one did it, is inaccurately set down in the criminal law books as a conspiracy.¹ In our civil jurisprudence, things are even more confused. There is an old writ of conspiracy; and, when it was in common use, it was said that “conspiracy, to speak properly, lies only for procuring a man to be indicted of treason or felony, where life was in danger.”² In other words, it was a branch of malicious prosecution.³ Afterward the ordinary action for conspiracy was case,⁴ and so it remains at the common law. But case, we have seen, is the common-law form of action for malicious prosecution,⁵ for deceit,⁶ for slander of title,⁷ and it is such also for slander and libel, and for various other similar wrongs. Hence, —

¹ 2 Bishop Crim. Law, § 173, 191–195.

² *Savill v. Roberts*, 1 *Ld. Raym.* 374, 379.

³ *Parker v. Huntington*, 2 *Gray*, 124; *Pollard v. Evans*, 2 *Show.* 50; *Jones v. Gwynn*, 10 *Mod.* 214; *Norris v. Palmer*,

2 *Mod.* 51; *Conspiracy Case*, 12 *Co.* 23.

⁴ *Ib.*; *Jones v. Westervelt*, 7 *Cow.* 445.

⁵ *Ante*, § 220.

⁶ *Ante*, § 313.

⁷ *Ante*, § 345.

§ 354. **More Defendants than One — Proof.** — The common-law action for a variety of wrongs being the same whether a conspiracy was charged or not, and it being commonly useful for a plaintiff to hold as many defendants as he could, the usage grew up for the pleader to draw into his net as defendants all persons against whom there was a probability of his proving any participation, and charging the act as a conspiracy. And the rule has always been and is that, though less than all are shown to be guilty, there may be a verdict against less, or even against one alone, if a sufficient wrongful act is made to appear against him.¹ In other words, the adjudged law is that, in these circumstances, the wrong is not a conspiracy either in whole or in part; if it were, there could be no verdict against any defendant unless the conspiracy was proved. To call it a conspiracy, therefore, is a mere abuse of language. Now, —

§ 355. **Whether Conspiracy.** — Is there a civil wrong properly termed conspiracy? In the criminal law, there are wrongs against the public, whereof a part are as incorrectly called conspiracy as are the civil ones just mentioned; but, at the same time, another part justly bear this name. The principle governing the latter is, that, under various circumstances, there is a special danger to the public from the combinings of people to do evil, and special need to punish such combinings, where the thing attempted, even if done by a single individual, would not be within the reasons justifying an indictment. So that there is a crime of conspiracy, consisting of the combining of will and endeavor, whereof one cannot be guilty unless his fellows are guilty also.² And it is a principle of our civil jurisprudence that, whenever one suffers specially from a crime, he may have his civil action of tort against the wrong-doer;³ or, as expressed in an English court, applying the principle specifically to conspiracy, if parties are

¹ *Subley v. Mott*, 1 Wils. 210; *Parker v. Huntington*, 2 Gray, 124; *Muriel v. Tracy*, 6 Mod. 169; note to *Skinner v. Gunton*, 1 Saund. Wms. ed. 228 d, 230; *Hutchins v. Hutchins*, 7 Hill, N. Y. 104; *Eason v. Westbrook*, 2

Murph. 329; *Laverty v. Vanarsdale*, 15 Smith, Pa. 507.

² 1 Bishop Crim. Law, § 592; 2 *Ib.* § 172, 180–190; 2 Bishop Crim. Proced. § 225.

³ Ante, § 279; post, § 424

liable to indictment for conspiracy, "then an action for conspiracy would lie."¹ Therefore the conclusion seems inevitable that there are circumstances in which conspiracy proper is actionable; in other words, in which one commits a civil wrong when, and only when, another or others participate with him. But—

§ 356. **Plaintiff Injured** — (**Whether Conspiracy, again**). — The rule in civil jurisprudence, that one cannot maintain a suit for another's wrong until he has been injured thereby,² greatly reduces the number of actions for what is truly conspiracy. The mere criminal combining is at the common law indictable,³ but no wrongful combination is actionable until the party complaining has suffered a damage;⁴ though, in proper circumstances, there may be in equity an injunction against carrying out the conspiracy.⁵ In an action at law, therefore, the material thing is to show an injury, and it would at the first impression seem to be unimportant whether one defendant or more did it. Probably from this reason, but it is of little consequence from what, some text-writers and judges have expressed the opinion that there is no such thing as conspiracy proper in our civil jurisprudence. The question could not be matter of judicial decision, for it would be impossible to make up a record involving it. Nor would it in any case be absolutely necessary that a verdict should be rendered against more than a single conspirator; for it is so even in the criminal law. But it is simple fact that there are actionable injuries which two or more can inflict on another, not within the power of one alone. Therefore it is fact, however we may reason, that there is a civil wrong properly termed conspiracy. Hence —

§ 357. **Defined.** — Conspiracy, in the proper, restricted

¹ *Mogul Steamship Co. v. McGregor*, &c. Co. 15 Q. B. D. 476, 483, 484, 15 Cox C. C. 740, Lord Coleridge, C. J.; *s. p.* *Carew v. Rutherford*, 106 Mass. 1, 10.

² *Ante*, § 22-34.

³ 2 *Bishop Crim. Law*, § 171-173, 192; *Reg. v. Best*, 1 Salk. 174; *Commonwealth v. Corlies*, 8 Philad. 450.

⁴ *Bishop Con.* § 521; *Savill v. Roberts*, 1 Ld. Raym. 374; *Kimball v. Harman*, 34 Md. 407; *Herron v. Hughes*, 25 Cal. 555; *Patten v. Gurney*, 17 Mass. 182; *Swan v. Saddle-mire*, 8 Wend. 676.

⁵ *Mogul Steamship Co. v. McGregor*, &c. Co. 15 Q. B. D. 476, 15 Cox C. C. 740.

meaning of the word, and viewed as a tort, is a malicious combination of two or more persons to injure another, in person or property, in a way not competent for one alone, resulting in actual damage to him.¹ Thus, —

§ 358. **Defrauding of Goods.** — A single individual might subject himself to an action of deceit by defrauding another of his goods. But there are ways of doing it which one cannot carry out alone, they require conspiracy. For example, two men enter into the compact that one shall buy goods of a third on credit, make a transfer of them to the other, then abscond; the third person is thus cheated, and he may maintain his action for conspiracy against the wrong-doers, though neither could have done this sort of cheat alone, and neither has done it unless the other did also his part.² Again, —

§ 359. **Hissing Actor to Ruin him.** — It is indictable for a company of men to conspire, not to express at a theatre the emotions which spontaneously arise in their minds, but to hiss a particular actor off the stage for the purpose of ruining him.³ Thereupon it follows from the rule above stated⁴ that, if this conspiracy is carried out, and the actor suffers from it a pecuniary damage, — as, for example, loses his engagements, — an action for conspiracy will lie against the conspirators.⁵ But it is obviously not in the power of one man to hiss off the stage an actor whom the rest of the audience approve, and the only possible action which can succeed in this case is one of conspiracy, though it is not necessary there should be a verdict against more than a single defendant.⁶

§ 360. **In the Law of Evidence** — conspiracy plays a con-

¹ In *Place v. Minster*, 65 N. Y. 89, 95, Dwight, C. said: "The essence of a conspiracy, so far as it justifies a civil action for damages, is a concert or combination to defraud or to cause other injury to person or property, which actually results in damage to the person or property of the person injured or defrauded."

² *Place v. Minster*, 65 N. Y. 89.

³ 2 Bishop Crim. Law, § 216, 308, note.

⁴ Ante, § 355.

⁵ *Gregory v. Brunswick*, 6 Man. & G. 205, 6 Scott N. R. 809, 1 Car. & K. 24, 8 Jur. 148, affirmed 3 C. B. 481. As to which see *Carew v. Rutherford*, 106 Mass. 1, 11. And see *Wildee v. McKee*, 1 Am. Pa. 335.

⁶ And, comparing with post, § 365, see *Carew v. Rutherford*, 106 Mass. 1; *Springhead Spinning Co. v. Riley*, Law Rep. 6 Eq. 551; post, § 1095.

siderable part, and the doctrine there is different from that here stated.¹ It is not for discussion in the present volume.

§ 361. **Misnamed Conspiracies.** — Civil actions which are improperly called conspiracy, such as deceit, slander, seduction, and various others where a conspiracy is needlessly alleged, and the allegation is treated as surplusage,² are governed, not by the law of conspiracy here stated, but by the rules pertaining to the class to which they belong.

§ 362. *The Doctrine of this Chapter restated.*

The term “conspiracy” is, in our books, oftener misapplied than used correctly. In the just meaning of the word, the title is a considerable one in the criminal law; in our civil jurisprudence it is narrow, yet it exists, and is important. It signifies, in the true and narrow sense, a wrongful combination of persons to do any act or acts which, when done, have brought to another an injury of a sort not admitting of being accomplished by one alone. Where the injury is what one could have effected alone, there is still a rule in the law of evidence useful to the plaintiff in making out a charge against confederates, — not explained in this chapter.

¹ 1 Bishop Crim. Proced. § 1248, 1249.

² For example, *Hayward v. Draper*, 3 Allen, 551.

CHAPTER XX.

SEDUCTIONS.

§ 363. Introduction.

364-367. General Doctrine.

368-372. Enticing away Servant or Employee.

373-377. Enticing away a Minor Child.

378-384. Immorally Seducing Female Servant.

385-387. Other Seductions of Women.

388. Doctrine of Chapter restated.

§ 363. **How Chapter divided.**— We shall consider, I. The General Doctrine; II. The Enticing from Service of a Servant or Employee; III. The Enticing away of a Minor Child; IV. Immorally Seducing a Female Child or Servant; V. Other Seductions of Women.

I. *The General Doctrine.*

§ 364. **The Principle**— has already appeared in various connections in the foregoing chapters, that, while a man may carefully conduct his own affairs, whether of pleasure or of business, without being responsible to another casually injured thereby, if, stepping outside of this line of doing, he inflicts harm upon another, he subjects himself to an action of tort.¹ Thus, —

§ 365. **Depriving of Services.**— One form of this harm is depriving a person of another's services to which he is entitled. We saw an illustration of this in assault and battery.² And it is the same where a disability is wrongfully inflicted in any other way; as, for example, by a railroad or other like

¹ And see the expositions of Wells, J. in *Walker v. Cronin*, 107 Mass. 555.

² Ante, § 201-203.

accident,¹ or by imprisoning the servant,² or carrying him away by force.³ It is the same thing also, in its legal consequences, to drive away the servant by threats.⁴ And that it is not different where his removal from the service is by seduction will be made specially to appear in this chapter. The seductions are various ; as to all, —

§ 366. *Doctrine defined.* — Enticement, or seduction, being a form of inflicting harm cognizable by the law, whenever one allures by it any person from the performance of a service due to another, the seducer may be compelled to compensate the other for any legal damage suffered.

§ 367. *Cases differing.* — Services become due in different ways, and there are varying forms of enticement. So that the further expositions of this chapter will be most conveniently made under their respective sub-heads, in the order already indicated.

II. *The enticing from Service of a Servant or Employee.*

§ 368. *Defined.* — It is actionable to entice away, from a master or employer, one who is under any legal obligation to render him personal service. Thus, —

§ 369. *Apprentice.* — This doctrine applies to an apprentice.⁵ And the relation of master and apprentice is such in law that the former is entitled absolutely to the earnings of the latter.⁶ So that, although the seducer of the apprentice commits by the seduction a tort, the master may waive it and sue him in form of contract for wages,⁷ even though they

¹ *Ames v. Union Ry.* 117 Mass. 541 ; *Dickson v. Dickson*, 33 La. An. 1261. *Martinez v. Gerber*, 3 Man. & G. 88, 5 Jur. 463. But this doctrine has been held not to extend to the compelling of a mere breach of contract between the servant and third person. *Alton v. Midland Ry.* 19 C. B. N. S. 213, 11 Jur. N. S. 672.

² *Woodward v. Washburn*, 3 Denio, 369.

³ *Reg. v. Daniel*, 6 Mod. 182.

⁴ *Garret v. Taylor*, Cro. Jac. 567 ;

Reg. v. Daniel, 6 Mod. 182 ; *Reavely v. Mainwaring*, 3 Bur. 1306.

⁵ *Barber v. Dennis*, 6 Mod. 69, 1 Salk. 68 ; *Munsey v. Goodwin*, 3 N. H. 272 ; *Bowes v. Tibbets*, 7 Greenl. 457 ; *Conant v. Raymond*, 2 Aikens, 243.

⁷ *Lightly v. Clouston*, 1 Taunt. 112 ;

Foster v. Stewart, 3 M. & S. 191 ;

James v. Le Roy, 6 Johns. 274.

have been already paid to the seduced apprentice,¹ or, if the facts justify, sue in trover for the thing earned.² But the apprentice himself can maintain no action.³ One of the consequences whereof is that, unlike the case of seducing an ordinary hired servant, the employer of an apprentice is liable in the action of contract to the master, although he did not know of the relationship.⁴ On the other hand, if the master wrongfully turns off the apprentice, — as, for example, assigns him over to another,⁵ — or, after he has absconded, announces that he will not receive him back,⁶ or commits any other analogous fault,⁷ he thereby forfeits his claim against one who harbors him. Plainly enough, also, if he sues the enticer for the tort, and not for the wages or thing earned, he must show that his adversary knew of the apprenticeship.⁸ So also it is in the like relation of parent and child.⁹

§ 370. **Hired Servant or Employee.** — It is actionable to seduce away from his service any employee under a contract of hire.¹⁰ But the author is not aware that an action against the seducer, directly for the wages which the servant earned, has, as in the case of the apprentice, been sustained. In principle, the two cases are believed to be different; the hired servant being simply under an executory obligation to his master, and the apprentice sustaining a *quasi* domestic relation which the law created, rendering his time in a different sense the master's. The contract need not be in writing,¹¹ or otherwise formal. It was sufficient where the servants were journeymen making shoes by the piece¹² in their own houses, and at the time of the seduction each one left a pair unfin-

¹ *Bardwell v. Purrington*, 107 Mass. 419, 427.

² *Barber v. Dennis*, *supra*; *Anonymous*, 12 Mod. 415.

³ *Bright v. Lucas*, Peake Ad. Cas. 121.

⁴ *James v. Le Roy*, *supra*.

⁵ *Ayer v. Chase*, 19 Pick. 556. See *Biggs v. Harris*, 64 N. C. 413.

⁶ *Conant v. Raymond*, *supra*.

⁷ *Bardwell v. Purrington*, *supra*.

⁸ *Stuart v. Simpson*, 1 Wend. 376; *Ferguson v. Tucker*, 2 Har. & G. 182.

See, also, *Stout v. Woody*, 63 N. C. 37; *Hays v. Borders*, 1 Gilman, 46.

⁹ Post, § 377.

¹⁰ *Bishop Dir. & F.* § 303; *Haskins v. Royster*, 70 N. C. 601; *Scidmore v. Smith*, 13 Johns. 322; *Jones v. Blocker*, 43 Ga. 331; *Hartley v. Cummings*, 5 C. B. 247; *Bixby v. Dunlap*, 56 N. H. 456; *Huff v. Watkins*, 20 S. C. 477.

¹¹ *Salter v. Howard*, 43 Ga. 601; *Huff v. Watkins*, 18 S. C. 510.

¹² *Anonymous*, *Lofft*, 493.

ished.¹ Nor need the employment be of a menial, of a laborious, of a mechanical, or of any other particular sort. The action was held to be maintainable by the lessee of a theatre for seducing away an artist who had agreed to perform therein.²

§ 371. **Under Binding Contract or not, distinguished.** — One carrying on his own honest business is legally justified in hiring away another's servant, who is under no valid contract of service;³ as, for example, where the term of service has expired.⁴ But an infant's contract of service, voidable only by reason of his infancy, is, within this distinction, good unless he has elected to avoid it.⁵ *A fortiori*, a contract binding on both sides is effectual for the present purpose.⁶ And there is apparent authority for saying that so also is a mere subsisting and continuing service at will, which either party may put an end to at pleasure.⁷ In the sub-title after the next we shall see that, by all opinions, this mere service at will suffices in the case of a female servant seduced from her virtue and gotten with child.⁸ The true doctrine, often overlooked in discussions on this subject, is believed to be, that, recurring to the principle stated at the opening of this chapter,⁹ where the servant is under no valid contract, yet not where he is under a voidable one which the party entitled has not elected to avoid,¹⁰ it is not actionable to hire him away for a lawful purpose, where the hirer is merely pursuing his own honest business; but to beat a servant during an actual service terminable at will,¹¹ or to seduce away and debauch a female in the same

¹ Hart v. Aldridge, Cowp. 54. And see Gunter v. Astor, 4 Moore, 12.

² Lumley v. Gye, 2 Ellis & B. 216, followed in Bowen v. Hall, 6 Q. B. D. 333. But see Burgess v. Carpenter, 2 S. C. 7.

³ Sykes v. Dixon, 9 A. & E. 693; Campbell v. Cooper, 34 N. H. 49.

⁴ Bishop Dir. & F. § 303; Nichol v. Martyn, 2 Esp. 732, 734; Walker v. Cronin, 107 Mass. 555; Boston Glass Manuf. v. Binney, 4 Pick. 425.

⁵ Keane v. Boycott, 2 H. Bl. 511. Otherwise where the infant has avoided

the contract. Langham v. The State, 55 Ala. 114.

⁶ Bishop Dir. & F. § 303; Milburne v. Byrne, 1 Cranch C. C. 239; Haight v. Badgeley, 15 Barb. 499; Haskins v. Royster, 70 N. C. 601; Bowen v. Hall, 6 Q. B. D. 333.

⁷ Evans v. Walton, Law Rep. 2 C. P. 615; Noice v. Brown, 10 Vroom, 569. See Benton v. Pratt, 2 Wend. 385.

⁸ Post, § 384.

⁹ Ante, § 364.

¹⁰ Bishop Con. § 620, 905, 924.

¹¹ Jones v. Brown, Peake, 233.

sort of service,¹ or to induce another's servants of this kind to leave him for the mere purpose of injuring him,² gives the master a claim upon the wrong-doer for damages, since here the latter has stepped aside from the lawful seeking of his own interests to do an unlawful act to the other's injury.

§ 372. **Known or not to be Servant — Subsequent Notice.** — Plainly, except in cases stated in a preceding section,³ if one in the discharge of the ordinary duties of life employs another's servant not knowing him to be such, the other's loss comes from an accident,⁴ which he must suffer without compensation. The new employer, therefore, to be chargeable with the seduction, must be aware of the relationship.⁵ Yet if, after being notified of it, he continues to employ the servant, his liability thereupon arises.⁶ On principle, it is believed that the distinction in the last section applies here also; so that, if the seduction is for an unlawful purpose, the seducer is liable to the master though he did not know of the relationship.⁷

III. *The Enticing away of a Minor Child.*

§ 373. **Compared with Servant.** — A minor child is ordinarily, in legal contemplation, his father's servant, but he is not necessarily such.⁸ Still —

§ 374. **General.** — The law invests the father with the right to the services of his minor children, male and female, while he supports them.⁹ Therefore one who entices such a child away is, within the doctrine of the last sub-title, liable to him in damages.¹⁰ Or, within the principle applicable to an ap-

¹ Evans v. Walton, supra.

² Dickson v. Dickson, 33 La. An. 1261. See Springhead Spinning Co. v. Riley, Law Rep. 6 Eq. 551.

³ Ante, § 369.

⁴ Ante, § 176-184.

⁵ James v. Le Roy, 6 Johns. 274; Morgan v. Smith, 77 N. C. 37; Cutting v. Seabury, 1 Sprague, 522.

⁶ Blake v. Lanyon, 6 T. R. 221;

Ferrell v. Boykin, Phillips, N. C. 9; Fawcett v. Beavres, 2 Lev. 63, 3 Keb. 59; Caughey v. Smith, 47 N. Y. 244.

⁷ Post, § 383. It would be so, even upon the principles of the criminal law. Bishop Stat. Crimes, § 631 a-632 a.

⁸ Post, § 551; Bishop Con. § 899; Swartz v. Hazlett, 8 Cal. 118.

⁹ 2 Bishop Mar. & Div. § 528.

¹⁰ Butterfield v. Ashley, 2 Gray, 254;

prentice,¹ the father may waive the tort and recover the child's earnings.² The English court has held that, in an action for an injury inflicted on the child, the father can recover nothing if he has incurred no special expense, and the child is too young — say, two and a half years old — to earn anything.³ Plainly, however, prospective earnings are to be taken into the account, and even a babe at the breast may be so injured as, within this principle, to entitle the father to this action.⁴

§ 375. **Relation Practically Subsisting.** — If the father does not support the child, who is away taking care of himself, his right to the earnings ceases,⁵ and the doctrine now in contemplation does not apply. The parental relation must be practically subsisting.⁶

§ 376. **The Mother.** — if the father dies, has the rights above described as to the children whom she supports living with her.⁷

§ 377. **Scienter.** — As in the case of an ordinary servant,⁸ the enticer, to be responsible in the action of tort,⁹ must be aware of the parental right.¹⁰ And, even beyond this, something of wrong or of malice has been deemed necessary, though perhaps nothing more than is implied in the idea of a seduction.¹¹

Evans v. Walton, Law Rep. 2 C. P. 615 ;
Bundy v. Dodson, 28 Ind. 295 ; Sargent
v. Mathewson, 38 N. H. 54.

¹ Ante, § 369.

² Weeks v. Holmes, 12 Cush. 215 ;
White v. Henry, 24 Maine, 531 ; Bishop
v. Shepherd, 23 Pick. 492. The father
will in proper circumstances be estopped
to recover his son's wages, or be held to
have waived his claim to them. Smith
v. Smith, 30 Conn. 111 ; Dodge v.
Favor, 15 Gray, 82 ; Jenness v. Emerson,
15 N. H. 486.

³ Hall v. Hollander, 4 B. & C. 660.

⁴ Post, § 558 ; Drew v. Sixth Ave.
Rld. 26 N. Y. 49 ; Traver v. Eighth
Ave. Rld. 4 Abb. Ap. 422.

⁵ 2 Bishop Mar. & Div. § 528.

⁶ Evans v. Walton, Law Rep. 2
C. P. 615 ; Wodell v. Coggeshall, 2
Met. 89 ; Jenness v. Emerson, 15 N. H.
486 ; Caughey v. Smith, 47 N. Y. 244,
250. Compare with post, § 380, 381.

⁷ Jones v. Tevis, 4 Litt. 25 ; Campbell
v. Campbell, 3 Stock. 268 ; Cain
v. Devitt, 8 Iowa, 116. And see Moritz
v. Garnhart, 7 Watts, 302.

⁸ Ante, § 372.

⁹ Ante, § 369.

¹⁰ Stowe v. Heywood, 7 Allen, 118,
120 ; Caughey v. Smith, 47 N. Y. 244 ;
Nash v. Douglass, 12 Abb. Pr. n. s.
187.

¹¹ Butterfield v. Ashley, 6 Cush.
249.

IV. *Immorally Seducing a Female Child or Servant.*

§ 378. **On what Principle.** — Leaving now out of view the relation of husband and wife, the only¹ common-law civil remedy for debauching a consenting female is that to be considered in this sub-title. It does not extend to all cases of debauchment, but only to those wherein, even though the complaining person is the parent, there is a subsisting legal relation of master and servant.² And the injury technically complained of by the master suing is the loss of services,³ without which the action cannot be maintained.⁴

§ 379. **Doctrine defined.** — Whenever any person sustains to a female the relation of master, whether being the father,⁵ the widowed mother,⁶ one *in loco parentis*,⁷ or the employer of an ordinary maid-servant,⁸ or probably of any other female employee under contract,⁹ if a man by an illicit connection with her causes any pecuniary loss to such master, he, not having connived at the wrong,¹⁰ and not being otherwise in fault relating to it,¹¹ may maintain against the wrong-doer his action; wherein he will recover, not merely the actual pecuniary

¹ Ante, § 57; post, § 386.

² Kinney v. Laughenour, 89 N. C. 365; Terry v. Hutchinson, Law Rep. 3 Q. B. 599; Roberts v. Connelly, 14 Ala. 235; Lee v. Hodges, 13 Grat. 726; South v. Denniston, 2 Watts, 474.

³ Gray v. Durland, 51 N. Y. 424.

⁴ Ogborn v. Francis, 15 Vroom, 441; Satterthwaite v. Dewhurst, 4 Doug. 315; Ellington v. Ellington, 47 Missis. 329; Hedges v. Tagg, Law Rep. 7 Ex. 283; Blaymire v. Haley, 6 M. & W. 55; Grinnell v. Wells, 7 Man. & G. 1033.

⁵ Lipe v. Eisenlerd, 32 N. Y. 229; Boyd v. Byrd, 8 Blackf. 113; Pence v. Dozier, 7 Bush, 133; Wert v. Strouse, 9 Vroom, 184.

⁶ Moran v. Dawes, 4 Cow. 412; Vilepigue v. Shular, 3 Strob. 462; Fur-

man v. Van Sise, 56 N. Y. 435; Gray v. Durland, 51 N. Y. 424; Lampman v. Hammond, 3 Thomp. & C. 293; Hitchman v. Whitney, 9 Hun, 512.

⁷ Maguinay v. Saudek, 5 Sneed, 146; Edmondson v. Machell, 2 T. R. 4, a case of assaulting and beating; Irwin v. Dearman, 11 East, 23; Blanchard v. Hsley, 120 Mass. 487; Watson v. Watson, 58 Mich. 507.

⁸ Fores v. Wilson, Peake, 55.

⁹ Ante, § 365, 370 et seq.; Ellington v. Ellington, 47 Missis. 329.

¹⁰ Ante, § 49-53, 57; Seagar v. Sligerland, 2 Caines, 219; Reddie v. Scoolt, Peake, 240; Hollis v. Wells, 3 Pa. Law Jour. Rep. 169; Richardson v. Fouts, 11 Ind. 466; Zerling v. Mourer, 2 Greene, Iowa, 520.

¹¹ Ante, § 54-65.

loss, but also exemplary damages,¹ as, for the disgrace of his family, the danger to their morals, his mental sufferings, and the loss of the society of the child.² To look at some of the particulars, —

§ 380. *Father's Legal Rights.* — Where the master suing is the father, and the servant is a minor, he may stand on rights conferred by the law, superior to those of most persons *in loco parentis*. He is entitled to the girl's services, whether she consents to serve him or not, and whether she is actually rendering them to him or not, unless he has in some way relinquished them past recall.³ Therefore in all cases where there has been no relinquishment, and the girl is a minor, he may maintain the action.⁴ But after she has arrived at full age, though she does not seek emancipation, he is legally in the same position only as a stranger *in loco parentis* to a parentless girl.⁵ The English courts seem not to have adverted to this distinction, and they reject the father's right to sue, founded on the girl's being his minor daughter, in various circumstances wherein it would be acknowledged by us.⁶ Leaving now the special right of the father, —

¹ *Irwin v. Dearman*, 11 East, 23; *Elliott v. Nicklin*, 5 Price, 641.

² *Terry v. Hutchinson*, Law Rep. 3 Q. B. 599, 603; *Ball v. Bruce*, 21 Ill. 161; *Stevenson v. Belknap*, 6 Iowa, 97; *Lavery v. Crooke*, 52 Wis. 612; *Morgan v. Ross*, 74 Mo. 318; *Ellington v. Ellington*, 47 Missis. 329; *Andrews v. Askey*, 8 Car. & P. 7; *Bedford v. McKowl*, 3 Esp. 119; *Phillips v. Hoyle*, 4 Gray, 568; *Hatch v. Fuller*, 131 Mass. 574; *Lunt v. Philbrick*, 59 N. H. 59.

³ *Dain v. Wycoff*, 3 Selden, 191; *White v. Murtland*, 71 Ill. 250.

⁴ *White v. Murtland*, *supra*; *Mohry v. Hoffman*, 5 Norris, Pa. 358; *Ball v. Bruce*, 21 Ill. 161; *Kennedy v. Shea*, 110 Mass. 147, 150; *Boyd v. Byrd*, 8 Blackf. 113; *Bolton v. Miller*, 6 Ind. 262; *Emery v. Gowen*, 4 Greenl. 33; *Greenwood v. Greenwood*, 28 Md. 369; *Martin v. Payne*, 9 Johns. 387; *Clark*

v. Fitch, 2 Wend. 459; *Bartley v. Richtmyer*, 4 Comst. 38, 44; *Sargent v. —*, 5 Cow. 106; *Howland v. Howland*, 114 Mass. 517; *Mulvehall v. Millward*, 1 Kernan, 343.

⁵ *Nickleson v. Stryker*, 10 Johns. 115; *Bartley v. Richtmyer*, *supra*, at p. 45; *Millar v. Thompson*, 1 Wend. 447; *Mercer v. Walmsley*, 5 Har. & J. 27; *Bennett v. Allcott*, 2 T. R. 166; *Wert v. Strouse*, 9 Vroom, 184. And it is the same though the daughter is a married woman, living with her father in separation from her husband. *Harper v. Luffkin*, 7 B. & C. 387, 1 Man. & R. 166.

⁶ *Dean v. Peel*, 5 East, 45; *Blaymire v. Haley*, 6 M. & W. 55; *Davies v. Williams*, 10 Q. B. 725. The New Jersey court appears to follow the English doctrine on this subject. *Ogborn v. Francis*, 15 Vroom, 441.

§ 381. **In Other Cases.** — There may be other cases, sometimes or in some States that of the mother on the father's death, within the special rule applicable to the father.¹ But where this rule does not apply, — that is, where the case is not within its reason, — whether the female is of full age under her father's care, or whether she is of any age under any other care specified in our definition,² there must be some subsisting service or some contract valid in law; though the mere subsisting service will suffice if simply at will, and only nominal and presumptive,³ or if divided between the party suing and a third person.⁴

§ 382. **Loss of Service.** — The loss of service, now to be considered, is that whereon the right to recover damages is founded, — in other words, the injury which must combine with the wrong,⁵ — and it should not be confounded with the mere nominal services⁶ which in these cases suffice to create the relation of master and servant.⁷ The master's loss⁸ must be something more than is implied in the mere sexual connection.⁹ It must come from the connection, as a proximate result; for example, it is not enough that the girl becomes sick and disqualified for labor through the distress of mind produced by a threatened exposure¹⁰ or probably by the seducer's abandoning her.¹¹ If the intercourse communicates a venereal disease,¹² or directly causes any other ill health¹³ or diminution of ability to labor,¹⁴ or pregnancy, which pre-

¹ *Sargent v. —*, 5 Cow. 106; *Furman v. Van Sise*, 56 N. Y. 435. Contra, as to the mother, *South v. Denniston*, 2 Watts, 474.

² Ante, § 379.

³ Ante, § 375; *Hedges v. Tagg*, Law Rep. 7 Ex. 283; *Manvell v. Thomson*, 2 Car. & P. 303; *Gray v. Durland*, 51 N. Y. 424.

⁴ *Rist v. Faux*, 4 Best & S. 409.

⁵ Ante, § 22-34; *Grinnell v. Wells*, 7 M. & G. 1033, 8 Scott N. R. 741, 8 Jur. 1101.

⁶ Ante, § 381.

⁷ It is remarkable that the New York court, at a time when the very ablest of

judges presided over it, committed the inadvertence against which I am cautioning the reader. *Hewitt v. Prime*, 21 Wend. 79.

⁸ Ante, § 378.

⁹ *Eager v. Grimwood*, 1 Exch. 61; *Grinnell v. Wells*, supra; *Humble v. Shoemaker*, 70 Iowa, 223.

¹⁰ *Knight v. Wilcox*, 4 Kernan, 413.

¹¹ *Boyle v. Brandon*, 13 M. & W. 738.

¹² *White v. Nellis*, 31 N. Y. 405.

¹³ *Blagge v. Ilsley*, 127 Mass. 191. See *Harris v. Butler*, 2 M. & W. 539.

¹⁴ *Abrahams v. Kidney*, 104 Mass. 222.

sumably reduces the capacity for work while yet there has been no birth of any living child,¹ the action is maintainable. There is little need to add that, *a fortiori*, it is so in the common case wherein the girl has given birth to a bastard child.

§ 383. **Scienter.**—In the cases within this sub-title, there is no need to allege and prove, as in those wherein one in the pursuit of his own interests hires another's servant,² that the seducer knew of the subsisting duty to serve the party complaining. There is not much direct authority on this question, for the doctrine thus stated has been accepted as of course. We have Chitty's authority for it,³ together with the practice not to introduce the allegation into the common-law declaration.⁴ The reason for the distinction is stated in preceding sections.⁵ And this doctrine is sustained and supplemented by another already appearing; namely, that, —

§ 384. **Non-obligatory Service de facto.**—By the common practice of the courts, accepted without dissent, and proved by the mass of cases, so that no one need be cited to the proposition, a mere service *de facto*, without any legal obligation to continue it, gives the master the right to sue for the seduction.⁶ We have seen that he has no such right where he complains of the hiring away of his servant.⁷ And however the judges may in many cases have overlooked the reason of the distinction, it plainly is that, in the one instance, the seducer is in the lawful pursuit of his own interests, rendering it impossible to put him in the wrong unless he knows of the servant's subsisting legal obligation; while, in the other instance, the immoral act is itself a wrong, and the complaining master need rely only on the possession of the service as against the palpable wrong-doer.

¹ *Ingerson v. Miller*, 47 Barb. 47; *Briggs v. Evans*, 5 Ire. 16. See *Humble v. Shoemaker*, supra.

² Ante, § 369, 371, 372, 377.

³ "It is not necessary to allege or prove that the defendant knew that the female was the daughter or servant of

the plaintiff." 2 Chit. Pl. 644, note, citing, among other places, *Fores v. Wilson*, Peake, 55.

⁴ 2 Chit. Pl. 644, 856.

⁵ Ante, § 371, 372.

⁶ Ante, § 378, 381.

⁷ Ante, § 371.

V. *Other Seductions of Women.*

§ 385. **Wife.**—The seduction or enticing away of a wife might properly enough be treated of in this connection; depending, as it does, mainly on principles stated in the foregoing sub-titles. But its more appropriate place is deemed to be elsewhere.

§ 386. **Action by Seduced Woman.**—We have seen that, under the common law, a woman cannot maintain a suit for her own seduction.¹ But in some of our States there are statutes changing this, and permitting her to sue.² The provision that “an action for seduction may be maintained without any allegation or proof of the loss of service” is not enough; the plaintiff, to be within these statutory words, must be one entitled under the prior law.³

§ 387. **Other Statutes,**—more or less augmenting the common-law remedy, prevail in a few of the States,⁴ but they do not require special notice.

§ 388. *The Doctrine of this Chapter restated.*

To entice away one from any duty which he owes to another is, in the absence of legal justification, a wrong to the person to whom the duty is due. And an action will lie for the redress of this wrong. Where the enticement consists simply in employing the one who owes the duty, the enticer, acting only in the prosecution of his own lawful affairs, is not liable in tort unless he knows of the existence of the duty. For a wrong in the defendant, concurring with a right in the plaintiff, must be shown. But where the enticement has no connection with any lawful doing, and is of a sort which is reprehensible whether the person enticed owes a service or

¹ Ante, § 57.

² *Thompson v. Young*, 51 Ind. 599; *Weiber v. Meyersham*, 50 Mich. 602; *Watson v. Watson*, 49 Mich. 540; *West v. Druff*, 55 Iowa, 335; *Watson v. Watson*, 53 Mich. 168; *Hodges v. Bales*,

102 Ind. 494; *Hart v. Walker*, 77 Ind.

331; *Wilson v. Shepler*, 86 Ind. 275.

³ *Woodward v. Anderson*, 9 Bush, 624.

⁴ *Ryan v. Fralick*, 50 Mich. 483; *Weiber v. Meyersham*, 50 Mich. 602.

not, notice of service due is not necessary as a foundation for the action. Moreover, in the former case, the service must arise either out of a contract or out of some other legal obligation; in the latter, a simple service *de facto* suffices. And the distinction comes from the right of every man, on the one hand, to carry on circumspectly the lawful affairs of life, without paying damage to a person casually injured thereby; and his liability, on the other hand, to make good the loss or suffering which another endures whenever he steps outside of this line of doing. The hiring away of a child from his father, or of an apprentice from his master, differs from that of a mere hired servant, in enabling the person injured, at his election, to sue for the wages earned, instead of his damages from the tort.

CHAPTER XXI.

TRESPASS TO PROPERTY.

§ 389. **Trespass** — is one of the common-law forms of action. And in giving it technical limits, the law circumscribes also the meaning of the word as applied to the wrong itself. So that there may be, for example, a conversion of personal property, to be explained in the next chapter, which is as great an injury to it as any trespass can possibly be, yet is not called by the same name. Not to undertake nice distinctions, the action of trespass is maintainable simply for an injury to the actual or constructive possession, committed by some immediate force,¹ and it does not lie for an injury to the ownership not thus in possession. So also assault and battery, treated of in a preceding chapter, is trespass, not to the property, but to the person. The forms of action pertain to the procedure, which is not for this volume. And wherever a division of our subject upon the line of those forms would cut up and separate things which belong together, it is the plan of these elucidations to seek instead some other order. Hence, —

§ 390. **Elsewhere.** — Further on, in a series of chapters, we shall among other things consider injuries to lands, chattels, ways, and the like, not inquiring whether the remedy for them is trespass or anything else. Therefore it is not desirable to introduce into this chapter the elucidations which, in legal treatises arranged in the order of the forms of action, make the present head an extensive one. But the title, if no more, seemed necessary to a completion of the general view to which the present Book is devoted. And there is a par-

¹ 1 Chit. Pl. 166 ; 2 Greenl. Ev. § 613, 614.

ticular doctrine, apparently concerning simply the form of the action, yet really entering into the law itself, requiring mention here ; namely, that of —

§ 391. *Trespass ab Initio* : —

Defined. — Whenever one enters upon the doing of a thing in itself actionable, yet made lawful by license, if the license comes, not from the party, but from the law, and the doer after properly proceeding part way abuses the license by some positive wrong, he forfeits it, so that it not even protects him as to what he rightfully did, but he is treated as a trespasser *ab initio*.¹ Thus, —

§ 392. **Law and Party distinguished.** — If one knocks at the door of a private dwelling and is invited in, then misconducts himself in the house, he is responsible for such misdoing therein, but his original entry is not treated as a trespass ; it having been made under license, not from the law, but from the party.² On the other hand, an innkeeper is required by law to receive as far as he can all guests applying ;³ one of the consequences of which is that the law licenses the applicant to enter the inn, and his entering without express invitation is not a trespass. But if one having thus entered misbehaves himself therein, his license is forfeited as from the beginning, and even his original entry is treated as a trespass.⁴

§ 393. **Why ?** — The Six Carpenters' Case, in Coke's Reports, is the source to which it is customary to trace this doctrine. And the reason there given for the distinction is that, where the law grants the license, "the law adjudges by the subsequent act, *quo animo*, or to what intent," the party acted thereon. But where the one complaining had himself ac-

¹ 1 Bishop Crim. Law, § 208 ; Six Carpenters Case, 8 Co. 146 a ; Waddell v. Cook, 2 Hill, N. Y. 47 ; Van Brunt v. Schenck, 13 Johns. 414 ; Narehood v. Wilhelm, 19 Smith, Pa. 64 ; Mussey v. Cummings, 34 Maine, 74 ; Burton v. Calaway, 20 Ind. 469 ; Bradley v. Davis, 14 Maine, 44 ; Jarratt v. Gwathmey, 5 Blackf. 237 ; Esty v. Wilmot, 15 Gray, 168 ; Oxley v. Watts, 1 T. R. 12.

² Smith v. Pierce, 110 Mass. 35 ; Dumont v. Smith, 4 Denio, 319 ; Allen v. Crofoot, 5 Wend. 506. For a contrary dictum stated in a case rightly decided, see Adams v. Freeman, 12 Johns. 408.

³ 1 Bishop Crim. Law, § 532.

⁴ Six Carpenters Case, 8 Co. 146 a.

corded the license, "he cannot, for any subsequent cause, punish that which is done by his own authority." "A better reason," a very eminent judge once observed,¹ "is given in Bacon's Abridgment: Where the law has given an authority, it is reasonable that it should make void everything done by the abuse of that authority, and leave the abuser as if he had done everything without authority. But where a man, who was under no necessity to give an authority, does so, and the person receiving the authority abuses it, there is no reason why the law should interpose to make void everything done by such abuse, because it was the man's folly to trust another with an authority who was not fit to be trusted therewith." This latter explanation seems to the present writer to be simply a fuller statement of the former. And neither is in contradiction of what, it is submitted, more tersely sets out the rule; namely, that the law, which is man's superior, acting more wisely than man, gives its license only to such persons as will not abuse it, so the subsequent abuse simply shows the person not to have been licensed. But man's license cannot be so treated, having in fact passed to the particular person, while the law's license never did pass.

§ 394. *Nature of Abuse.*—The abuse of the law's license, which will render the party a trespasser *ab initio*, must consist of something more than a mere mistake or a mere evil intent, it must be some seriously wrongful or illegal act.² Generally an omission to do something will not suffice;³ as, after entering a hotel and drinking wine therein, not paying for it.⁴ But a negative wrong may be such in nature and extent as to become in effect a positive one; so that, for example, where it is the duty of the particular officer serving a writ to return it, one cannot justify the trespass under the writ unless he has made the return.⁵

¹ Savage, C. J. in *Allen v. Crofoot*, 5 Wend. 506, 509.

² *Gates v. Lounsbury*, 20 Johns. 427; *Taylor v. Jones*, 42 N. H. 25; *Page v. De Puy*, 40 Ill. 506; *Stoughton v. Mott*, 25 Vt. 668.

³ *Gardner v. Campbell*, 15 Johns. 401.

⁴ *Six Carpenters Case*, 8 Co. 146 a.

⁵ *Freeman v. Blewitt*, 1 Salk. 409, 1 Ld. Raym. 632; *Girling's Case*, Cro. Car. 446; *Williams v. Ives*, 25 Conn. 568.

§ 395. *The Doctrine of this Chapter restated.*

One of the methods by which a man may injure another as to property is to commit upon it a trespass. But this particular form of injury does not essentially differ from others except in name. Therefore it is not in this volume proposed, under this title, to enter into the consideration of this particular form of injury, but to look at all the injuries together further on, without special reference to their names. There is a peculiar doctrine, called trespass *ab initio*, to the effect that, whenever the law permits the doing of some specific thing which otherwise would be a trespass, it grants this permission only to such persons as will not abuse it. So that, whenever one abuses the law's license, he is deemed to have been excepted out of its terms and never to have received it. Though what he did at the beginning would have been justifiable if he had done nothing more, the doing of the more makes him a trespasser *ab initio*.

CHAPTER XXII.

CONVERSION OF GOODS.

§ 396. **Relation of Subject to Procedure.** — To properly comprehend this subject, it is necessary to consider something of the common-law forms of action beyond what is said in the last chapter. Thus, —

§ 397. **Trover** — is the ordinary common-law action for a conversion of chattels. It proceeds on the idea that the defendant has *found* the chattel and appropriated it to himself.¹ But, in the actual administration of the law, the element of finding is utterly disregarded, the plaintiff need not prove it; for example, if the goods came into the defendant's hands by trespass,² by an innocent purchase from a thief³ or other wrongful possessor,⁴ or by a bailment,⁵ he may waive the trespass or other special matter and sue in trover, the same as though there had been a finding in fact. Yet to maintain this particular action, he must have a right both to the property and to the possession of it.⁶ If he has a title in abeyance, he may recover in some other form of action;⁷ so that, for our present purpose, we may as well consider the action to be trover as anything else. Now, instead of trover, —

§ 398. **Replevin.** — If the goods have been taken wrong-

¹ 1 Chit. Pl. 146.

² Glenn v. Garrison, 2 Harrison, 1; Prescott v. Wright, 6 Mass. 20; Pierce v. Benjamin, 14 Pick. 356; Burgin v. Burgin, 1 Ire. 453.

³ Newkirk v. Dalton, 17 Ill. 413.

⁴ Riley v. Boston Water Power Co. 11 Cush. 11.

⁵ Simmons v. Sikes, 2 Ire. 98; Ewart v. Kerr, Rice, 203.

⁶ Pyne v. Dor, 1 T. R. 55; Gordon v. Harper, 7 T. R. 9; Owen v. Knight, 4 Bing. N. C. 54; Jefferies v. Great Western Ry. 5 Ellis & B. 802; Bradley v. Copley, 1 C. B. 685.

⁷ Mears v. London, &c. Ry. 11 C. B. N. S. 850.

fully,¹ or, in some of our States, detained wrongfully,² the owner who is entitled to possession may maintain replevin, an action wherein he regains the goods themselves. But this action is not available in every case within the scope of the last section, and practically it can be employed only where the officer serving the writ can put his hands on the goods to retake them.

§ 399. **Ultimate Ownership.** — If the party reclaiming the goods elects replevin, a judgment in his favor determines the ownership to be in him as against the defendant. Of course, while the action is pending, the question is in abeyance. It is equally in abeyance if he brings trover. But the judgment in trover is, when satisfied, an investing of the defendant with the title.³ And it plainly enough takes effect as of the time of the original conversion.⁴ Hence, —

§ 400. **Nature of Conversion.** — Since, during the pendency of either form of the suit for conversion, the title is thus in abeyance, and in the eye of the law the ownership is uncertain, the act which the law terms conversion must take place without any legal transmutation of the property right. It is simply, like a trespass, which indeed it may in form be, a wrong to the owner of the chattel, inflicted on the chattel itself.⁵ Hence, also, —

§ 401. **Return of Converted Chattel.** — In principle, one who has converted another's chattel without changing it in form

¹ *George v. Chambers*, 11 M. & W. 149, 159, 160; *Acker v. Campbell*, 23 Wend. 372; *Mennie v. Blake*, 6 Ellis & B. 842; *Galloway v. Bird*, 12 Moore, 547; *Ely v. Ehle*, 3 Comst. 506.

² *Simpson v. McFarland*, 18 Pick. 427; *Dugan v. Nichols*, 125 Mass. 576; *Badger v. Phinney*, 15 Mass. 359; *Esson v. Tarbell*, 9 Cush. 407; *Eggleston v. Mundy*, 4 Mich. 295; *Sawtelle v. Rollins*, 23 Maine, 196; *Crocker v. Mann*, 3 Misso. 472; *The State v. Jennings*, 14 Ohio State, 73. "Every unlawful detention is a 'taking.'" *Lord Denman*, C. J. in *Evans v. Elliott*, 5 A. & E. 142, 146, a proposition not in apparent

harmony with cases cited in the last note.

³ *Cooper v. Shepherd*, 3 C. B. 266; *Foreman v. Neilson*, 2 Rich. Eq. 287; *Rogers v. Moore*, Rice, 60; *Robertson v. Montgomery*, Rice, 87; *Chartran v. Schmidt*, Rice, 229; *Osterhout v. Roberts*, 8 Cow. 43; *Hepburn v. Sewell*, 5 Har. & J. 211; *Spivey v. Morris*, 18 Ala. 254; *Smith v. Alexander*, 4 Sneed, 482.

⁴ *Buckland v. Johnson*, 15 C. B. 145, 18 Jur. 775.

⁵ That conversion may exist without a transmutation of the ownership, see *Keyworth v. Hill*, 3 B. & Ald. 685, 688.

or otherwise permanently injuring it may, at any time before suit, return it in its original condition¹ as of right; for, since the owner's claim is that the chattel remains his, and the law affirms this claim on condition that the facts are as he holds them to be, he could not refuse to receive it without thereby relinquishing his right of action for the wrong. To say that the chattel is not his would be to disclaim any ground of complaint. If in effect it was destroyed, though the physical substance remained, he could well deny that the thing offered was the thing which he claimed. In matter of settled doctrine, an accepted return does not bar the action of trover, but it mitigates the damages.² As to what is thus set down on principle, the adjudications are from their very nature fragmentary, leaving more or less of the ground uncovered. We have some contrary *dicta*;³ and, on the other hand, where the conversion was simply what is implied from a refusal to return the chattel on demand, a subsequent offer of return was held to take away the right itself to the action of trover.⁴ But in the cases in contemplation at the opening of this sec-

¹ *Hart v. Skinner*, 16 Vt. 138; *Green v. Sperry*, 16 Vt. 390.

² *Gibbs v. Chase*, 10 Mass. 125, 128; *Greenfield Bank v. Leavitt*, 17 Pick. 1; *Wheelock v. Wheelwright*, 5 Mass. 104; *Easton v. Woods*, 1 Misso. 506; *Smith v. Downing*, 6 Ind. 374; *Sparks v. Purdy*, 11 Misso. 219; *Yale v. Saunders*, 16 Vt. 223; *Rank v. Rank*, 5 Barr, 211.

³ For example, in *Gibbs v. Chase*, supra, Sewall, J. says: "He who interferes with my goods, and without any delivery by me, and without my consent, undertakes to dispose of them, as having the property, general or special, does it at his peril to answer me the value in trespass or trover, and even a subsequent tender of the goods will not excuse him if I choose to demand the value." And see *Brewster v. Silliman*, 38 N. Y. 423, 428; *Higgins v. Whitney*, 24 Wend. 379, 380. If one hires a horse to drive five miles to A, but after starting concludes to drive five

miles to B instead, he commits the tort of converting the animal. Post, § 405. Should now the owner, wishing to sell it, and ascertaining the hirer's change of purpose, refuse to receive it on his return uninjured, and demand its value, would any court sustain him? In reason, the owner had simply suffered nominal damages for the technical conversion. He could not say, in answer to the tender in return, "This is not the creature I lent you." The law would tell him, assuming the facts to be as thus stated, "If you accept this tender, you do not waive your damages; but, if you reject it, and the jury believe as you do that this is the horse you lent, remaining in the same condition as when you lent it, you disclaim the very ownership on which you rely for the damages incurred by the conversion."

⁴ *Hayward v. Seaward*, 1 Moore & S. 459; *Wells v. Kelsey*, 15 Abb. Pr. 53; *Powers v. Bassford*, 19 How. Pr. 309.

tion, the offer would not have such effect ; since the accepted return would not, because operating only to reduce the damages.

§ 402. *Return during Suit.* — While the trover suit is pending, the court may, in its discretion, permit the defendant to return to the plaintiff the chattel,¹ paying the accrued costs of suit, and thereupon it will stay the proceedings,² or allow the plaintiff to go on and recover more if he can.³ Practically this order will be limited to cases free from complications ; as, where it is plain what chattel is meant, where special damages are not claimed, and where prices do not fluctuate.⁴ To proceed, enlightened by these preliminaries, —

§ 403. *Defined.* — A conversion of a chattel is any dealing with it which impliedly or by its terms excludes the dominion of the owner.⁵ For example, —

¹ 1 Tidd Pr. 8th ed. 571 ; Rogers v. Crombie, 4 Greenl. 274.

² Fisher v. Prince, 3 Bur. 1363.

³ Rutland, &c. Rld. v. Bank of Middlebury, 32 Vt. 639 ; Peacock v. Nickolds, 4 Jur. 368, 8 Dowl. P. C. 367.

⁴ Fisher v. Prince, *supra* ; Tucker v. Wright, 11 Moore, 500 ; Whitten v. Fuller, 2 W. Bl. 902 ; Makinson v. Rawlinson, 9 Price, 460 ; Gibson v. Humphrey, 1 Crompt. & M. 544.

⁵ I am not aware that there is any particular form of the definition which has become standard. In *Hiort v. Bott*, Law Rep. 9 Ex. 86, 89, Bramwell, B. observed : "Mr. Bosanquet gave a good description of what constitutes a conversion when he said that it is where a man does an unauthorized act which deprives another of his property permanently or for an indefinite time." In another case, it being laid down that a mere trespass, sufficient to sustain the action of trespass, is not enough, Alderson, B. added : "Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion ; for this simple reason, that it is an act inconsistent with the general right of dominion which the

owner of the chattel has in it, who is entitled to the use of it at all times and in all places." *Fouldes v. Willoughby*, 8 M. & W. 540, 548. "The word 'convert' is well known to lawyers, and it means that, where any man who is entrusted with goods of another puts them into the hands of a third person contrary to his orders, he converts them." *Pollock, B. in Reg. v. Wynn*, 16 Cox C. C. 231, 233. He adds that this was decided in *Syeds v. Hay*, 4 T. R. 260 and *Wilbraham v. Snow*, 2 Saund. 47 a. "It is generally laid down that any act which is an interference with the dominion and right of property of the plaintiff is a conversion, but this requires some qualification." *Blackburn, J. in Hollins v. Fowler*, Law Rep. 7 H. L. 757, 766. "Detaining goods so as to deprive the person entitled to the possession of them of his dominion over them." *Martin, B. in Burroughes v. Bayne*, 5 H. & N. 296, cited by *Brett, J. in Hollins v. Fowler*, *supra*, at p. 780. See, further, *Bristol v. Burt*, 7 Johns. 254 ; *Boyce v. Brockway*, 31 N. Y. 490 ; *Reynolds v. Shuler*, 5 Cow. 323, 325 ; *Fuller v. Tabor*, 39 Maine, 519.

§ 404. **Selling.** — If one, either innocently or fraudulently, sells as his own another's chattel, both he and the purchaser severally convert it.¹

§ 405. **Things under Bailment.** — A carrier who, without excuse, delivers the goods to the wrong person, converts them.² One converts a thing which he has hired if he uses it for a purpose not contemplated;³ as, if the hirer of a horse drives it further than was agreed or in a different direction,⁴ or the hirer of a carriage does the like with it.⁵ Ordinarily, for example, if the horse dies while thus converted, the wrong-doer must pay its full value to the owner,⁶ or pay the damages if injured,⁷ — a rule applicable to all chattels.⁸ Again, —

§ 406. **Demand and Refusal.** — If one has in possession another's chattel, however lawfully, and thereupon determines to "exclude the dominion of the owner," as expressed in our definition,⁹ he converts it. A refusal to deliver it up on demand is, therefore, not in itself a conversion, but is evidence¹⁰ of it more or less conclusive according to the circumstances; commonly, if absolute, it is sufficient *prima facie*.¹¹ There

¹ Hollins v. Fowler, Law Rep. 7 H. L. 757, in which the proposition applicable to the particular facts was, that "any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion," p. 795, the case of the purchaser not being also before the court; Roe v. Campbell, 40 Hun, 49; Scudder v. Anderson, 54 Mich. 122; Riley v. Boston Water Power Co. 11 Cush. 11; Champney v. Smith, 15 Gray, 512; Jones v. Thurloe, 8 Mod. 172; Cooper v. Wilomatt, 1 C. B. 672; Loeschman v. Machin, 2 Stark. 311; Glaspy v. Cabot, 135 Mass. 435; Murray v. Burling, 10 Johns. 172; Kimball v. Billings, 55 Maine, 147; Briggs v. Boston, &c. Rld. 6 Allen, 246; Branch v. Planters Loan, &c. Bank, 75 Ga. 342.

² Jeffersonville Rld. v. White, 6 Bush, 251; Roberts v. Yarboro, 41

Texas, 449; Claflin v. Boston, &c. Rld. 7 Allen, 341; Taylor v. —, 2 Ld. Raym. 792.

³ Bell v. Cummings, 3 Sneed, 275; Buchanan v. Smith, 10 Hun, 474; Lane v. Cameron, 38 Wis. 603.

⁴ Ante, § 76; Ray v. Tubbs, 50 Vt. 688; Freeman v. Boland, 14 R. I. 39; Woodman v. Hubbard, 5 Fost. N. H. 67; Fish v. Ferris, 5 Duer, 49; Disbrow v. Tenbroeck, 4 E. D. Smith, 397; Rotch v. Hawes, 12 Pick. 136.

⁵ Hart v. Skinner, 16 Vt. 138.

⁶ Wheelock v. Wheelwright, 5 Mass. 104; Ray v. Tubbs, supra.

⁷ Homer v. Thwing, 3 Pick. 492; Lucas v. Trumbull, 15 Gray, 306.

⁸ Columbus v. Howard, 6 Ga. 213; Lewis v. McAfee, 32 Ga. 465.

⁹ Ante, § 403.

¹⁰ Morris v. Pugh, 3 Bur. 1241, 1243.

¹¹ Golightly v. Reynolds, Lofft, 88; Philpott v. Kelley, 3 A. & E. 106; Mitchell v. Williams, 4 Hill, N. Y. 13; Davies v. Nicholas, 7 Car. & P. 339;

are even cases wherein, as viewed by some courts if not all, the denial of right to the owner making the demand is itself in law a conversion; "for," said Holt, C. J. "what is a conversion but an assuming upon one's self the property and right of disposing another's goods, and he that" does this "takes upon himself the right of disposing of them."¹ On the other hand, the facts may justify a temporary detaining after demand;² as, where in good faith the possessor questions the authority³ or ownership⁴ of the person demanding, or where for some good reason he is unable to make instant restitution.⁵

§ 407. **Other Examples** — abound in the books, but the foregoing show sufficiently the nature of the doctrine.

§ 408. *The Doctrine of this Chapter restated.*

Where one by contract transfers his goods to another, the transmutation of the title is an ordinary rightful occurrence. But there may be a tortious transmutation. It commonly, but not always or necessarily, occurs where one acts under a claim of right. Then if the parties ask the court to settle their misunderstanding, the judge does not know, in advance of the steps which ascertain the facts, in which party was the original ownership, and whether or not there was a conversion. He simply calls it a conversion for the one who is not the owner to so deal with the thing as to exclude the owner's dominion over it. And the effect of the litigation will in some instances be to transmute the wrongful conversion into a rightful one; confirming the ownership in the wrong-doer, and compensating the injured person.

Magee v. Scott, 9 Cush. 148; *Dietus v. Fuss*, 8 Md. 148; *Allen v. Ogden*, 1 Wash. C. C. 174; *Folsom v. Manchester*, 11 Cush. 334.

¹ *Baldwin v. Cole*, 6 Mod. 212; *Hinckley v. Baxter*, 13 Allen, 139; *Pullen v. Bell*, 40 Maine, 314; *Davis v. Taylor*, 41 Ill. 405; *Farrar v. Chauffe-tete*, 5 Denio, 527; *O'Donoghue v. Corby*, 22 Mo. 393, 394.

² *Verrall v. Robinson*, 2 Crompt. M.

& R. 495, 1 Gale, 244; *Canot v. Hughes*, 2 Bing. N. C. 448; *Garvin v. Luttrell*, 10 Humph. 16; *Butler v. Jones*, 80 Ala. 436.

³ *Ingalls v. Bulkley*, 15 Ill. 224.

⁴ *Wellington v. Wentworth*, 8 Met. 548.

⁵ *Beckman v. McKay*, 14 Cal. 250; *Whitney v. Slauson*, 30 Barb. 276; *Fillmore v. Horton*, 31 How. Pr. 424; *Buck v. Ashley*, 37 Vt. 475.

CHAPTER XXIII.

NUISANCE.

§ 409, 410. Introduction.

411-422. In General.

423-426. Some Particular Nuisances.

427-431. Something of Remedy.

432. Doctrine of Chapter restated.

§ 409. **Here — Elsewhere.** — To avoid repetitions, this chapter will be limited to the general principles of its subject, and to the particular nuisances which are not explained in other connections. Nuisances to public and private ways, for example, and some others, are within chapters further on.

§ 410. **How Chapter divided.** — We shall here consider, I. In General of the Subject; II. Some Particular Nuisances; III. Something of the Remedy.

I. *In General.*

§ 411. **Defined.** — A nuisance, of the sort which is redressed at the suit of the party, is anything, done on one's premises or elsewhere, or put into circulation, or omitted to be done contrary to a legal duty, wherefrom, through the separate action of nature or of the common course of events, an injury follows to or directly menaces another; or, it is any indictable nuisance which has wrought a special harm to the individual.¹ For example, —

¹ The books do not abound in definitions of this wrong, whether viewed as a civil one or a criminal. The present author has defined an indictable or common nuisance to be "any act or neglect the product of which works an annoyance or injury to the entire community; or, the product itself is termed a nuisance." 1 Bishop Crim. Law, § 1072. Blackstone gives one defini-

§ 412. **On Own Land.** — It is a plain proposition in the abstract, yet not always easy of application,¹ that a man may put whatever erection or thing he will on his own land, or do upon it whatever else he pleases, but he must not even touch his neighbor's soil or otherwise interfere with his rights. At the same time, it is impossible for a person to do anything without employing Nature as his servant and assistant. One could not walk if the gravitation of nature did not aid him, or build a house without the help of some of nature's laws. Therefore when a man takes the natural laws into his employ, as he must necessarily do whenever he performs any act on his own soil, he becomes responsible for what those laws collaterally accomplish. So that, if anything which he there does or erects results, through the natural laws combining, in injury to a neighbor in the proper use and enjoyment of his property, it is a nuisance.² A privy so built that its filth percolates into the adjoining owner's well,³ a tree so planted that its roots run into the well and pollute it,⁴ a cesspool that ac-

tion, covering both the public and private nuisance; namely, "Nuisance, *nocumentum*, or annoyance, signifies anything that worketh hurt, inconvenience, or damage." 3 Bl. Com. 216. And this definition has been much followed by subsequent writers and judges. The objection to it is, that it means nothing definite; for example, a rifle ball that kills a man "worketh hurt," but it is not commonly classed with the nuisances. And see *Coker v. Birge*, 9 Ga. 425; *Norcross v. Thoms*, 51 Maine, 503; *Miller v. Burch*, 32 Texas, 208; *Cooper v. Hall*, 5 Ohio, 320, 323; *Columbus Gas-light, &c. Co. v. Freeland*, 12 Ohio State, 392, 397. A captious critic might turn my criticism of Blackstone's definition upon my own, but I think not justly. The difficulty of defining nuisance is obvious; it grows in part out of the fact that many wrongs are indifferently termed nuisance or something else, at the convenience or whim of the writer. Thus, injuries to ways, to private lands, various injuries

through negligence, wrongs harmful to the physical health, disturbances of the peace, and numberless other things are often or commonly spoken of as nuisances while equally they are called by the other name, and the other name may include other things also which are not nuisances. The idea of a nuisance appears to be, that something is put out, or left out, or not taken in, which some law of nature or course of common events operates upon, to work hurt, in distinction from the thing itself working hurt through its own inherent forces.

¹ Ante, § 98, 99.

² *Grady v. Wolsner*, 46 Ala. 381; *Dennis v. Eckhardt*, 3 Grant, Pa. 390; *Morley v. Pragnell*, Cro. Car. 510; *Cleveland v. Citizens Gas-light Co.* 5 C. E. Green, 201; *Attorney-General v. Steward*, 5 C. E. Green, 415.

³ *Haugh's Appeal*, 6 Out. Pa. 42; *Knauss v. Brua*, 11 Out. Pa. 85; *Ball v. Nye*, 99 Mass. 582.

⁴ *Buckingham v. Elliott*, 62 Missis. 296.

compleishes a like mischief to the well,¹ any noxious substance which is washed into it by the rain,² water collected in a cellar which percolates into a neighboring cellar,³ the fouling of a stream of water to the use whereof another is entitled,⁴ the damming up of the stream so as to diminish the flow of water,⁵ the creating of foul odors⁶ or dust and noise⁷ or smoke⁸ which the winds bear to a neighboring dwelling-house,—these are severally specimens of things which, if done by one on his own land, are actionable nuisances to the other who is injured thereby. So —

§ 413. **Dangerous Article.**— It is a nuisance, which is also treated as negligence,⁹ to send out into the community a thing liable to be used by persons ignorant of its nature to their injury; and, if one not himself chargeable with negligence receives harm from it, he has his action against the sender.¹⁰ Something like this was considered under the title Deceit.¹¹ Therefore, if a manufacturer sells naphtha to a retailer, ignorant of its explosive qualities, to be dealt out to persons equally ignorant, for use in ordinary lamps, a purchaser who confidingly receives it for the purpose and is injured by an explosion has his action against the one who thus put it in circulation.¹² It is the same of a ferocious or noisy dog which the owner, cognizant of its habits, permits to go at large.¹³ Again —

¹ *Norton v. Scholefield*, 9 M. & W. 665.

² *Brown v. Illius*, 27 Conn. 84.

³ *Snow v. Whitehead*, 27 Ch. D. 588.

⁴ *Hodgkinson v. Ennor*, 4 Best & S. 229; *Stockport Waterworks v. Potter*, 7 H. & N. 160, 7 Jur. N. s. 880.

⁵ *Raikes v. Townsend*, 2 Smith, 9.

⁶ *Illinois Cent. Rld. v. Grabill*, 50 Ill. 241; *Aldred's Case*, 9 Co. 57 b; *Ottawa Gas-light, &c. Co. v. Thompson*, 39 Ill. 598; *Fay v. Whitman*, 100 Mass. 76.

⁷ *Fish v. Dodge*, 4 Denio, 311; *Bishop v. Banks*, 33 Conn. 118; *Davidson v. Isham*, 1 Stock. 186.

⁸ *Rich v. Basterfield*, 4 C. B. 783; *Simpson v. Savage*, 1 C. B. N. s. 347, 3

Jur. N. s. 161; *Crump v. Lambert*, Law Rep. 3 Eq. 409; *Beir v. Cooke*, 37 Hun, 38.

⁹ Post, § 483.

¹⁰ *Thomas v. Winchester*, 2 Selden, 397; *Davidson v. Nichols*, 11 Allen, 514, 519; *McDonald v. Snelling*, 14 Allen, 290, 295; *Shillito v. Thompson*, 1 Q. B. D. 12; *The State v. Taylor*, 29 Ind. 517.

¹¹ Ante, § 321.

¹² *Wellington v. Downer Ker. Oil Co.* 104 Mass. 64, referring, among other cases, to *Farrant v. Barnes*, 11 C. B. N. s. 553, 8 Jur. N. s. 868; *George v. Skivington*, Law Rep. 5 Ex. 1. And see *Hourigan v. Nowell*, 110 Mass. 470.

¹³ *Putnam v. Payne*, 13 Johns. 312;

§ 414. **Contagious Disease.** — Anything which exposes people to a contagious disease is a nuisance,¹ giving the person injured a right of action; as, to let a house knowing it to be laden with small-pox, yet concealing the fact, and one is infected;² to take children to a boarding-house, knowing them to have whooping-cough, and thus transmit it to other children;³ for an inn-keeper to receive a guest while another guest is sick in his house with small-pox, thus communicating to the former the disease.⁴ The mere negative —

§ 415. **Neglect** — to do a legal duty is, when the necessary evil consequences follow, a nuisance.⁵ Thus, if a building is burned, leaving dangerous walls standing, the owner should tear them down or make them secure; neglecting which, he is liable to a person injured by their falling into the street.⁶ So one is liable for neglecting to make repairs, contrary to his duty, resulting in a nuisance.⁷

§ 416. **Nature of Harm.** — It is immaterial what the harm is which results to the complaining party; any sort will suffice, if the other necessary ingredients combine with it.⁸ A proper condition of the atmosphere, for example, is necessary to human life and comfort; and it is little else than repetition⁹ to say that to disturb it by noise, especially of the disagreeable sort, or uncomfortably loud,¹⁰ or to render it offensive to the senses or injurious to health,¹¹ is an actionable nui-

Brill v. Flagler, 23 Wend. 354; Hinckley v. Emerson, 4 Cow. 351.

¹ Meeker v. Van Rensselaer, 15 Wend. 397.

² Minor v. Sharon, 112 Mass. 477; Cesar v. Karutz, 60 N. Y. 229.

³ Smith v. Baker, 20 Fed. Rep. 709.

⁴ Gilbert v. Hoffman, 66 Iowa, 205.

⁵ Broder v. Saillard, 2 Ch. D. 692; Ross v. Clinton, 46 Iowa, 606; Saulsbury v. Ithaca, 94 N. Y. 27.

⁶ Church of Ascension v. Buckhart, 3 Hill, N. Y. 193. And see Mullen v. St. John, 57 N. Y. 567.

⁷ Tenant v. Golding, 1 Salk. 21; Alston v. Grant, 3 Ellis & B. 128.

⁸ Columbus Gas-light, &c. Co. v.

Freeland, 12 Ohio State, 392, 399; Crump v. Lambert, Law Rep. 3 Eq. 409, 413.

⁹ Ante, § 412.

¹⁰ Ball v. Ray, Law Rep. 8 Ch. Ap. 467; McCaffrey's Appeal, 9 Out. Pa. 253; Walker v. Brewster, Law Rep. 5 Eq. 25; Inchbald v. Robinson, Law Rep. 4 Ch. Ap. 388; Brill v. Flagler, 23 Wend. 354; Bishop v. Banks, 33 Conn. 118.

¹¹ Morley v. Pragnell, Cro. Car. 510; Hopkins v. Western Pac. Rld. 50 Cal. 190; Montezuma v. Minor, 73 Ga. 484; Daughtry v. Warren, 85 N. C. 136; Shaw v. Cummiskey, 7 Pick. 76; Ross v. Butler, 4 C. E. Green, 294; Walter v. Selfe, 4 De G. & S. 315, 15 Jur. 416; Babcock v. New Jersey Stock-yard Co.

sance. It is equally such to send through the air what will injure another's property; as, by destroying vegetation.¹ To cause a shaking and jarring of another's premises is a wrong of the same sort.² And thus we might proceed through the whole circle of life before exhausting the illustrations.

§ 417. **Harm only Impending.** — Though equity sometimes enjoins a thing which merely threatens harm to a suitor,³ an action at law will not lie until actual injury has been inflicted.⁴ Therefore, to constitute an actionable nuisance, the wrong must have proceeded to the extent of doing to one some real detriment. But an assault, where the blow does not reach the body, is an actionable wrong, because of its disquieting effect upon the mind.⁵ On a like principle, there may be, while yet there is not often, a suable private nuisance which has resulted in no tangible damages. The mere careless keeping of gunpowder to the endangering of the public is indictable, while yet no one has been injured thereby,⁶ whence it follows that the same may be actionable.⁷ To build one's house so that water will be projected from the roof upon a neighbor's land is a nuisance which has sufficiently ripened before any rain has fallen.⁸ Anything so erected on one's own land as to overhang another's is a nuisance to him.⁹ Even if one constructs a bay-window so as to project over a street the fee whereof is in his neighbor, it is a private nuisance to the neighbor, though no specific damage is shown to have been suffered.¹⁰

§ 418. **Useful Trades and Private Residences.** — Two things essential to general prosperity and happiness are useful trades, whereby people are supplied with things necessary in life, and

5 C. E. Green, 296; *Jarvis v. St. Louis*, &c. Ry. 26 Mo. Ap. 253.

¹ *Campbell v. Seaman*, 63 N. Y. 568; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642, 11 Jur. N. s. 785.

² *McKeon v. See*, 51 N. Y. 300; *Demarest v. Hardham*, 7 Stew. Ch. 469.

³ 2 Story Eq. § 862; post, § 428.

⁴ Ante, § 22-34.

⁵ Ante, § 190, 191, 194.

⁶ *People v. Sands*, 1 Johns. 78;

Heeg v. Licht, 16 Hun, 257; *Anonymous*, 12 Mod. 342.

⁷ Ante, § 279, 355; post, § 424; *Emory v. Hazard Powder Co.* 22 S. C. 476.

⁸ *Fay v. Prentice*, 1 C. B. 828. And see *Wilmarth v. Woodcock*, 58 Mich. 482; *Copper v. Dolvin*, 68 Iowa, 757.

⁹ *Meyer v. Metzler*, 51 Cal. 142; *Grandona v. Lovdal*, 70 Cal. 161.

¹⁰ *Codman v. Evans*, 1 Allen, 443, 5 Allen, 308.

healthful and peaceful dwellings. And the structures for habitation and trade cannot well be remote from one another. Here, therefore, are two interests, travelling to one ultimate goal, yet in constant conflict during the journey. And the courts, in administering justice between them, necessarily require each to lay aside something of what pertains to mere convenience and comfort, yet they permit each to stand so far on its own rights as not to be destroyed.¹ The question does not admit of a great deal of technical rule; it is rather practical, and moulded in its forms by the exigencies of the particular case.² As to the dwelling, "the real question in all the cases" is said to be the one "of fact, namely, whether the annoyance is such as materially to interfere with the ordinary comfort of human existence."³ Trifling inconveniences are not regarded.⁴ But however useful and lawful the business, if, as carried on, it gives to the neighboring residents annoyance materially interfering with the ordinary physical comforts of life, it will be adjudged a nuisance.⁵ On the other hand, it is within the reason of the thing, and it accords with the common course of the decisions and of the judicial *dicta* to say, that those who carry on the business will not be permitted to inflict even a less degree of annoyance needlessly, where its avoidance is fairly practicable.⁶ Prominent among the things taken into the account in these cases is that of —

§ 419. **Priority.** — The early settlement of a neighborhood or town gives it, to a degree varying with the particular facts, a character not to be needlessly interfered with. One may

¹ Sanderson v. Pennsylvania Coal Co. 5 Norris, Pa. 401; Daniels v. Keokuk Waterworks, 61 Iowa, 549; McCaffrey's Appeal, 9 Out. Pa. 253; Daughtry v. Warren, 85 N. C. 136.

² St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642, 11 Jur. N. S. 785; Gaunt v. Fynney, Law Rep. 8 Ch. Ap. 8, 11; Bamford v. Turnley, 3 Best & S. 62.

³ Lord Romilly, M. R. in Oldham v. Oldham, Law Rep. 3 Eq. 404, 413.

⁴ Gaunt v. Fynney, *supra*.

⁵ Cleveland v. Citizens Gas-light Co. 5 C. E. Green, 201; Attorney-General v. Steward, 5 C. E. Green, 415; Robinson v. Baugh, 31 Mich. 290; Ottawa Gas-light, &c. Co. v. Thompson, 39 Ill. 598; Aldrich v. Howard, 8 R. I. 246.

⁶ Babcock v. New Jersey Stock-yard Co. 5 C. E. Green, 296; Stockport Waterworks v. Potter, 7 H. & N. 160, 7 Jur. N. S. 880; Rosser v. Randolph, 7 Port. 238; Green v. Lake, 54 Missis. 540.

lawfully establish, remote from habitations, a useful business which would be a nuisance in a dense neighborhood, or erect in a locality away from nuisances an elegant dwelling-house; under such circumstances that another building a house beside the nuisance could not compel its removal, or setting up the nuisance beside the dwelling-house would have to take it away.¹ And he who makes his habitation in a trading or manufacturing neighborhood or a dense city must not look forward to compelling the removal of the population and business, but must submit to the discomforts necessarily arising therefrom.² On the other hand, a man should establish his business in "a convenient place," to employ an expression found in some of the English cases, so ascertained by the jury, in order to justify its necessary annoyance to neighboring dwellings.³

§ 420. **Grant — Prescription.** — Plainly one may grant to another the right to establish beside him a mere private nuisance, not injurious to any other person.⁴ Therefore, after the lapse of the necessary time, the other may have this right by prescription.⁵ But the prescription does not carry the authority to increase the offensive thing, while yet it does not preclude minor changes in mere form.⁶ Nor can it authorize the continuing of an indictable public nuisance, since the commission of one crime does not empower the offender to commit another,⁷ — a proposition sometimes a little modified in favor of useful trades.⁸ It follows, therefore, that one

¹ *Sanderson v. Pennsylvania Coal Co.* 5 Norris, Pa. 401; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642, 11 Jur. N. s. 785; *Whitney v. Bartholomew*, 21 Conn. 213; *Cleveland v. Citizens Gas-light Co.* 5 C. E. Green, 201.

² *Robinson v. Baugh*, 31 Mich. 290; *Rhodes v. Dunbar*, 7 Smith, Pa. 274.

³ *Hole v. Barlow*, 4 C. B. N. s. 334, 4 Jur. N. s. 1019; *Cavey v. Ledbitter*, 13 C. B. N. s. 470; *Bamford v. Turnley*, 3 Best & S. 62.

⁴ *Hewlins v. Shippam*, 5 B. & C. 221; *Corley v. Lancaster*, 81 Ky. 171.

⁵ *Flight v. Thomas*, 10 A. & E. 590; *Baxendale v. McMurray*, Law Rep. 2 Ch. Ap. 790; *Elliotson v. Feetham*, 2 Scott, 174, 2 Bing. N. C. 134; *Bucklin v. Truell*, 54 N. H. 122; *Dana v. Valentine*, 5 Met. 8; *Sprague v. Rhodes*, 4 R. I. 301.

⁶ *Baxendale v. McMurray*, *supra*; *Ball v. Ray*, Law Rep. 8 Ch. Ap. 467; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396.

⁷ 1 Bishop Crim. Law, § 1078 *a*, 1131, 1139-1141.

⁸ *Ib.* § 1139-1141.

sued for a special injury to the plaintiff by a public nuisance cannot aid his defence from prescription.¹

§ 421. **No Useful Purpose.** — Where the thing which creates annoyance has no useful purpose,² and especially where it is in its nature harmful, the case is quite different from that of a beneficial trade. There is then no balancing of good on the one side against evil on the other. The collection of a noisy crowd, with added music and fire-works, at an entertainment for profit,³ or the setting up of a boisterously conducted circus,⁴ whereby a neighboring dweller is disturbed; the frightening away, by the firing of guns and other means, of customers from a trader;⁵ the opening of a bawdy-house next to a properly conducted dwelling,⁶ — these, and various other injuries to private comfort, are severally actionable nuisances, and they illustrate the principle. Yet precisely how much less of private damage will satisfy the courts in this class of cases than in the other it would be difficult to state in the form of a rule.

§ 422. **Continuance.** — Within the principle that a neglect may be a nuisance,⁷ it is in law the same offence for one to continue a nuisance which it is his duty to remove as to establish it in the first place, though under the common-law rules there are differences as to notice and the procedure.⁸

¹ Ante, § 279, 355, 417; post, § 424; *Beckwith v. Griswold*, 29 Barb. 291; *Mills v. Hall*, 9 Wend. 315; *Wright v. Moore*, 38 Ala. 593.

² *Tanner v. Albion*, 5 Hill, N. Y. 121.

³ *Walker v. Brewster*, Law Rep. 5 Eq. 25. And see *Rex v. Moore*, 3 B. & Ad. 184.

⁴ *Inchbald v. Robinson*, Law Rep. 4 Ch. Ap. 388.

⁵ *Tarleton v. McGawley*, Peake, 205; *Gilbert v. Mickle*, 4 Sandf. Ch. 357.

⁶ *Marsan v. French*, 61 Texas, 173; *Hamilton v. Whitridge*, 11 Md. 128.

⁷ Ante, § 415.

⁸ *Staple v. Spring*, 10 Mass. 72, 74;

Beckwith v. Griswold, 29 Barb. 291; *Roswell v. Prior*, 12 Mod. 635; *Thompson v. Gibson*, 7 M. & W. 456; *McConnell v. Kibbe*, 29 Ill. 483; *Plumer v. Harper*, 3 N. H. 88; *Gandy v. Jubber*, 5 Best & S. 78; *Shadwell v. Hutchinson*, 4 Car. & P. 333; *McDonough v. Gilman*, 3 Allen, 264; *Brown v. Cayuga, &c. Rld.* 2 Kernan, 486; *Knauss v. Brua*, 11 Out. Pa. 85; *Hodges v. Hodges*, 5 Met. 205; *Beckley v. Skroh*, 19 Mo. Ap. 75; *Slight v. Gutzlaff*, 35 Wis. 675; *Grady v. Wolsner*, 46 Ala. 381; *Pinney v. Berry*, 61 Mo. 359; *McGowan v. Missouri Pac. Ry.* 23 Mo. Ap. 203.

II. *Some Particular Nuisances.*

§ 423. **What here.** — For this sub-title to travel through the entire list of nuisances would be useless repetition. We shall only look at some particulars; as, —

§ 424. **Private from Public.** — The rule governing these cases has already been stated to be, that, whenever one suffers specially from a crime,¹ and not merely as any other one of the public might, he may have his civil action of tort against the doer.² The mass of indictable nuisances do not present facts to which this rule can be applied, but some do.³ For example, it is a nuisance of this sort to put any part of one's building upon the highway; then, if the projection injures another man's building by its side, the latter may have his action.⁴ So likewise it is a public nuisance to obstruct a navigable stream; thereupon, if one is by such an obstruction prevented from fulfilling his contract, he can maintain a civil suit against the obstructer.⁵

§ 425. **Statutory.** — If a statute or a municipal by-law, valid in law, authorizes a thing to be done, it is not a nuisance though of a sort which would be such but for the authorization;⁶ for example, though it renders the neighborhood unhealthy.⁷ On the other hand, a like provision may make a thing a nuisance which was not at the common law.⁸ Or a

¹ Explained, ante, § 71.

² Ante, § 279, 355.

³ *Rose v. Groves*, 5 Man. & G. 613, 7 Jur. 951; *Hounsell v. Smyth*, 7 C. B. n. s. 731, 6 Jur. n. s. 897; *McLaunchlin v. Charlotte*, &c. Rld. 5 Rich. 583; *Carey v. Brooks*, 1 Hill, S. C. 365; *Yolo v. Sacramento*, 36 Cal. 193; *Crommelin v. Coxe*, 30 Ala. 318; *Wesson v. Washburn Iron Co.* 13 Allen, 95; *Lansing v. Smith*, 4 Wend. 9; *Miller v. New York*, 109 U. S. 385; *Grisby v. Clear Lake Waterworks*, 40 Cal. 396; *Venard v. Cross*, 8 Kan. 248; *New Salem v. Eagle Mill*, 138 Mass. 8; *Gordon v. Baxter*, 74 N. C. 470.

⁴ *Stetson v. Faxon*, 19 Pick. 147.

⁵ *Dudley v. Kennedy*, 63 Maine, 465.

And see *Harmond v. Pearson*, 1 Camp. 515.

⁶ Ante, § 111-114; *Miller v. New York*, 109 U. S. 385; *Sawyer v. Davis*, 136 Mass. 239; *London, &c. Ry. v. Truman*, 11 Ap. Cas. 45; *Lewis v. Stein*, 16 Ala. 214; *Attorney-General v. New York, &c. Rld.* 9 C. E. Green, 49; *Danville, &c. Rld. v. Commonwealth*, 23 Smith, Pa. 29.

⁷ *Commonwealth v. Reed*, 10 Casey, Pa. 275.

⁸ *Bepley v. The State*, 4 Ind. 264; *Sangamon Distilling Co. v. Young*, 77 Ill. 197.

nuisance may be committed by doing what a statute authorizes, in a manner contrary to the authorization.¹

§ 426. **Enumeration.** — It is not the name of a thing that makes it a nuisance, but its nature, the manner in which it is carried on, its proximity to other things, and its relations to the persons complaining.² Useful trades and other beneficial works are nuisances or not according as these tests determine them to be. Some of them, within this principle, are a tin-smith's shop,³ a blacksmith's shop,⁴ a pumping station for waterworks,⁵ a slaughter-house,⁶ a tallow-furnace,⁷ a candle manufactory,⁸ a livery stable,⁹ smelting works,¹⁰ a rolling mill,¹¹ a paper mill,¹² a brick manufactory,¹³ a railroad in operation,¹⁴ any machinery run by steam power,¹⁵ a manufactory of fertilizers,¹⁶ a gas-house,¹⁷ a steam cotton press,¹⁸ a distillery,¹⁹ a soap factory,²⁰ a tannery.²¹ Things of a different sort, yet

¹ *Commonwealth v. Erie, &c. Rld.*
³ *Casey, Pa.* 339; *Cogswell v. New York, &c. Rld.* 103 N. Y. 10.

² *Sturges v. Bridgman*, 11 Ch. D. 852; *Dittman v. Repp*, 50 Md. 516; *Cooke v. Forbes*, Law Rep. 5 Eq. 166.

³ *Dennis v. Eckhardt*, 3 Grant, Pa. 390.

⁴ *Bradley v. Gill*, 1 Lutw. 29; *Faucher v. Grass*, 60 Iowa, 505; *Whitaker v. Hudson*, 65 Ga. 43; *Whitney v. Bartholomew*, 21 Conn. 213.

⁵ *Daniels v. Keokuk Waterworks*, 61 Iowa, 549.

⁶ *Somerville v. O'Neil*, 114 Mass. 353; *Fay v. Whitman*, 100 Mass. 76; *Bushnell v. Robeson*, 62 Iowa, 540; *Babcock v. New Jersey Stock-yard Co.* 5 C. E. Green, 296; *Attorney-General v. Steward*, 5 C. E. Green, 415; *Dubois v. Budlong*, 10 Bosw. 700.

⁷ *Morley v. Pragnell*, Cro. Car. 510.

⁸ *Tohayles Case*, cited Cro. Car. 510.

⁹ *Aldrich v. Howard*, 8 R. I. 246; *Hastings v. Aiken*, 1 Gray, 163; *Kirkman v. Handy*, 11 Humph. 406; *Coker v. Birge*, 10 Ga. 336; *Dargan v. Waddill*, 9 Ire. 244; *Aldrich v. Howard*, 7 R. I. 87.

¹⁰ *St. Helen's Smelting Co. v. Tippling*, 11 H. L. Cas. 642, 11 Jur. N. S. 785.

¹¹ *Scott v. Firth*, 4 Fost. & F. 349.

¹² *Baxendale v. McMurray*, Law Rep. 2 Ch. Ap. 790.

¹³ *Wanstead v. Hill*, 13 C. B. N. S. 479, 9 Jur. N. S. 972; *Walter v. Selfe*, 4 De G. & S. 315, 15 Jur. 416; *Beardmore v. Tredwell*, 3 Gif. 683, 9 Jur. N. S. 272; *Bamford v. Turnley*, 3 Best & S. 62, 9 Jur. N. S. 377; *Cavey v. Ledbitter*, 13 C. B. N. S. 470.

¹⁴ *First Baptist Church v. Schenectady, &c. Rld.* 5 Barb. 79; *Randle v. Pacific Rld.* 65 Mo. 325; *Geiger v. Filor*, 8 Fla. 325; *Baltimore, &c. Rld. v. Fifth Baptist Church*, 108 U. S. 317.

¹⁵ *McKeon v. See*, 4 Rob. N. Y. 449; *Davidson v. Isham*, 1 Stock. 186; *Saltonstall v. Banker*, 8 Gray, 195; *Dema-rest v. Hardham*, 7 Stew. Ch. 469.

¹⁶ *Fertilizing Co. v. Hyde Park*, 97 U. S. 659.

¹⁷ *Ottawa Gas-light &c. Co. v. Thompson*, 39 Ill. 598; *Carhart v. Auburn, &c. Co.* 22 Barb. 297.

¹⁸ *Ryan v. Copes*, 11 Rich. 217.

¹⁹ *Greene v. Nunnemacher*, 36 Wis. 50; *Smith v. McConathy*, 11 Misso. 517.

²⁰ *Howard v. Lee*, 3 Sandf. 281; *Brady v. Weeks*, 3 Barb. 157.

²¹ *Howell v. McCoy*, 3 Rawle, 256; *Rex v. Pappineau*, 1 Stra. 686.

within the same principle, are a drain or sewer,¹ a dock,² a mill or other artificial pond,³ a privy,⁴ a cattle-pen,⁵ a tomb or cemetery.⁶ These are but illustrations of universal doctrine.

III. *Something of the Remedy.*

§ 427. **Here.** — It is not proposed to depart, in this place, from the rule which limits our elucidations to the law, in distinction from the procedure. But the peculiar nature of nuisance requires, for a proper understanding of the law, something under the present sub-head. Besides the suit at law for damages, we have, as a familiar remedy, the equity —

§ 428. **Injunction.** — Equity, in circumstances which bring the case within its principles, will enjoin a private nuisance, whether it is also a public one or not, but not in every case as of course.⁷

§ 429. **Judicial Abatement.** — In the flexible proceedings in equity, an abatement of the nuisance,⁸ or its equivalent⁹ —

¹ *Sturges v. Theological Ed. Soc.* 549; *Sampson v. Smith*, 8 Sim. 272, 2 130 Mass. 414; *Vale Mills v. Nashua*, 63 N. H. 136; *Morse v. Fair Haven East*, 48 Conn. 220; *Burton v. Chattanooga*, 7 Lea, 739; *Shaw v. Cummiskey*, 7 Pick. 76.

² *Larson v. Furlong*, 63 Wis. 323.

³ *Brookfield v. Walker*, 100 Mass. 94; *Welton v. Martin*, 7 Misso. 307; *Gilbert v. Morris Canal, &c. Co.* 4 Halst. Ch. 495; *Attorney-General v. Perkins*, 2 Dev. Eq. 38.

⁴ *Rand v. Wilber*, 19 Bradw. 395; *Allen v. Smith*, 76 Maine, 335.

⁵ *Illinois Cent. Rld. v. Grabill*, 50 Ill. 241, 248.

⁶ *Barnes v. Hathorn*, 54 Maine, 124; *Begein v. Anderson*, 28 Ind. 79; *Musgrove v. Catholic Church of St. Louis*, 10 La. An. 431; *New Orleans v. Wardens*, 11 La. An. 244.

⁷ 1 Bishop Crim. Proced. § 1417; *Rand v. Wilber*, 19 Bradw. 395, 397; *Daniels v. Keokuk Waterworks*, 61 Iowa,

⁸ *Van Bergen v. Van Bergen*, 2

⁹ *Kelk v. Pearson*, Law Rep. 6 Ch. Ap. 809.

the injunction is in substance though not in form an abatement¹ — may be ordered. And we have statutes in a part or all of our States authorizing the court under its law² or equity jurisdiction, or not specifying which, to command and enforce the abatement.³

§ 430. **Private Abatement.** — Contrary to the general rule that no man may personally enforce his rights, the law to a large degree allows people to abate, without invoking judicial sanction, nuisances which injure them, and, to an extent not quite definite, those which injure the public. Subject to qualifications, some of them not free from dispute, one may abate a nuisance of any sort from which he individually receives a detriment,⁴ or which is indictable by reason of being harmful to the public whereof he is a part.⁵ We have some unqualified judicial *dicta* to the effect that only one specially injured can abate a public nuisance.⁶ But the cases in their actual facts are simply those wherein, for some particular reason, it might well enough be considered that private abatement should not be exercised; as, if a man builds a horse-shed for use on Sundays while he is at church, standing in part on the public way as laid out but not as worked, an in-

Johns. Ch. 272; Sprague v. Rhodes, 4 R. I. 301; Vaughn v. Law, 1 Humph. 123; Mississippi, &c. Rld. v. Ward, 2 Black. 485, 492; Hoole v. Attorney-General, 22 Ala. 190; The State v. Mobile, 24 Ala. 701; Carlisle v. Cooper, 3 C. E. Green, 241.

¹ See, for illustration, Tipping v. St. Helen's Smelting Co. Law Rep. 1 Ch. Ap. 66. Yet compare with Ruff v. Phillips, 50 Ga. 130.

² Codman v. Evans, 7 Allen, 431; Cromwell v. Lowe, 14 Ind. 234; Bemis v. Clark, 11 Pick. 452.

³ Ruff v. Phillips, *supra*; De Costa v. Massachusetts, &c. Co. 17 Cal. 613; Bear River, &c. Co. v. Boles, 24 Cal. 359; Thornton v. Smith, 11 Minn. 15; Snow v. Cowles, 6 Fost. N. H. 275; League v. Journeay, 25 Texas, 172; Gribben v. Hansen, 69 Iowa, 255; Kothenberthal v. Salem, 13 Oregon, 604.

⁴ Lonsdale v. Nelson, 2 B. & C. 302, 311; Perry v. Fitzhowe, 8 Q. B. 757; Amoskeag, &c. Co. v. Goodale, 46 N. H. 53; Rung v. Shoneberger, 2 Watts, 23; Mason v. Cæsar, 2 Mod. 65; Lancaster Turnpike v. Rogers, 2 Barr, 114; Moffett v. Brewer, 1 Greene, Iowa, 348; Harvard College v. Stearns, 15 Gray, 1; Arundel v. McCulloch, 10 Mass. 70.

⁵ 1 Bishop Crim. Law, § 828, 1080, 1081; Burnham v. Hotchkiss, 14 Conn. 311; Adams v. Beach, 6 Hill, N. Y. 271; Wetmore v. Tracy, 14 Wend. 250; Day v. Day, 4 Md. 262; King v. Sanders, 2 Brev. 111; Hart v. Albany, 3 Paige, 213; Meeker v. Van Rensselaer, 15 Wend. 397.

⁶ Colchester v. Brooke, 7 Q. B. 339, 376, 377; Godsell v. Fleming, 59 Wis. 52; Brown v. Perkins, 12 Gray, 89, 101.

different third person cannot tear down the part.¹ When the courts hold that an individual without special interest cannot pull up a torpedo laid in a harbor to destroy a steamship just entering it laden with merchandise and peaceful human freight, or remove a dynamite bomb from a street thronged with passing vehicles, or take from a railway track an obstruction about to wreck a coming train of cars, or exercise any other act not in the line of villany, the present writer will consent to set down these *dicta* as law, beside the fact that civilization has departed from among us. In a judicial proceeding, from an obvious reason apart from this doctrine, a private individual cannot be the plaintiff seeking the abatement of a public nuisance not specially harmful to him.² Now, further of —

§ 431. **Limits of Doctrine.** — This beneficial doctrine of private abatement has, like other general doctrines, its reasonable limits. Commonly, for example, when a building is kept as a nuisance, the abatement of the nuisance does not require the destruction of the structure, and to proceed so far would be unlawful.³ And in all cases there should be no needless injury to the property.⁴ Where a building is itself a nuisance, it may, of course, be torn down; but, if there are people dwelling in it, this cannot be done suddenly and without notice, to the breach of the peace.⁵ Nor in any abatement is it lawful to break the peace.⁶ One may enter on his neighbor's land to abate a nuisance which the latter has erected there.⁷ But this liberty has been deemed not to ex-

¹ *Godsell v. Fleming*, supra. And see *Hopkins v. Crombie*, 4 N. H. 520; *Rogers v. Rogers*, 14 Wend. 131.

² *Payne v. McKinley*, 54 Cal. 532; *Parrott v. Floyd*, 54 Cal. 534; *Blood v. Nashua, &c. Rld.* 2 Gray, 137; *Ofstie v. Kelly*, 33 Minn. 440.

³ *Ely v. Niagara*, 36 N. Y. 297; *Welch v. Stowell*, 2 Doug. Mich. 332; *Barclay v. Commonwealth*, 1 Casey, Pa. 503. For what seems to have been deemed an exception, see *Meeker v. Van Rensselaer*, 15 Wend. 397.

⁴ *The State v. Moffett*, 1 Greene, Iowa, 247; *Indianapolis v. Miller*, 27 Ind. 394; *Northrop v. Burrows*, 10 Abb. Pr. 365; *Aaron v. Broiles*, 64 Texas, 316; *Finley v. Hershey*, 41 Iowa, 389; *Roberts v. Rose*, Law Rep. 1 Ex. 82, 89, 4 H. & C. 103, 12 Jur. n. s. 78; *Calef v. Thomas*, 81 Ill. 478.

⁵ *Perry v. Fitzhowe*, 8 Q. B. 757, 776; *Davies v. Williams*, 16 Q. B. 546, 555, 556.

⁶ *Day v. Day*, 4 Md. 262.

⁷ *Raikes v. Townsend*, 2 Smith, 9; *Jones v. Williams*, 11 M. & W. 176;

tend to what comes from the neighbor's mere omission.¹ There are cases in which, from their special nature, notice and request must precede the act of private abatement;² as, for example, where the person is in the wrong only from being the purchaser of the land whence the offence proceeds.³

§ 432. *The Doctrine of this Chapter restated.*

To put out any act or thing whence any law of nature or common course of events carries, or creates a disquieting danger of carrying, harm to an individual or the public, is a nuisance, entitling one who has suffered therefrom to an action at law, or in many circumstances to a bill in equity, against the doer. But the harm must be substantial. And there is a difference whether it comes from a mere folly or even innocent recreation, or from the pursuit of a useful business. In the one case, the nuisance will be constituted by an annoyance less serious; in the other, it will be considered that the business must be carried on somewhere while yet it may be restrained to its less offensive methods, and that the individual may properly be required to concede something to the public good. None of the useful trades are nuisances to the extent that they are everywhere and under all circumstances to be suppressed. But any disturbing trade may be excluded, when the opposing interests are too much prejudiced by it, from a particular locality and especially from its more objectionable methods. One may ordinarily, without applying to the courts, take away — that is, abate — what another has put out, when he finds it a nuisance to himself, but in so doing he must not commit a breach of the peace, or inflict on the author of the nuisance unnecessary injury. For the purpose of abating it he may, with some limitations, enter upon the land whence the offence proceeds.

Rex v. Rosewell, 2 Salk. 459. See Grant v. Allen, 41 Conn. 156.

¹ Lonsdale v. Nelson, 2 B. & C. 302, 311.

² Verder v. Ellsworth, 59 Vt. 354.

³ Groff v. Ankenbrandt, 19 Bradw. 148; Thornton v. Smith, 11 Minn. 15; Snow v. Cowles, 6 Fost. N. H. 275. But see Morris, & Co. v. Ryerson, 3 Dutcher, 457.

And he may abate a public nuisance which is specially harmful to himself, or immediately dangerous to others. Whether a private person can go further in abating a public nuisance from which he suffers only as one of the public, or how much further, is a question upon which judicial opinions seem not to be quite uniform. But it is believed that, however contrary to reason and the dictates of humanity the language of some of the cases may be, no bench of judges will actually mulct in damages, or send to prison as for crime, the man who rescues another from an immediate peril to life or even to property, by abating a public nuisance whence the danger impends; and that the more considerate will extend the right of privately abating public nuisances to whatever appears reasonable, and for the good order and safety of the community, in the particular instance. To deny to men the common rights of human brotherhood — to forbid one to do a kindly act for the good of others — does not accord with the spirit of our jurisprudence.

CHAPTER XXIV.

NEGLIGENCE.

- § 433, 434. Introduction.
- 435-449. General Doctrine.
- 450-453. Negligence combining with other Causes.
- 454-457. Proximate and Remote Effects.
- 458-470. Contributory Negligence.
- 471-473. Comparative Negligence.
- 474-477. Other Impediments to Suit for Injury.
- 478-483. In Particular Cases.
- 484. Doctrine of Chapter restated.

§ 433. **In other Connections** — will be considered various questions within the subject of this title; such as the contributive negligence of a young child, the responsibility of an employer for his servant's negligence, negligence between master and servant and fellow-servants, the negligence of corporations; negligence in the running of railway and other vehicles, of the passengers, and of other persons in contact therewith; and negligence as to lands, fences, ways, animals, and other things within the scope of the volume.

§ 434. **How Chapter divided.** — We shall consider, I. The General Doctrine; II. Negligence combining with other Causes; III. Proximate and Remote Effects; IV. Contributory Negligence; V. Comparative Negligence; VI. Other Impediments to recovering Damages for Injuries from Negligence; VII. In Particular Cases.

I. The General Doctrine.

§ 435. **Already,** — in a short chapter, the principle governing our present topic has been stated.¹ And there the doctrine is briefly —

¹ Ante, § 148-154.

§ 436. **Defined.** — The former definition,¹ rendered more comprehensive so as the better to serve the present purpose, is, that negligence is any lack of carefulness in one's conduct, whether in doing or in abstaining from doing,² wherefrom, by reason of its not filling the full measure of the law's requirement in the particular circumstances, there comes to another a legal injury³ to which he did not himself contribute by his own want of carefulness or other wrong.⁴

§ 437. **Differing Circumstances.** — Negligence, therefore, being the absence of care according to the circumstances,⁵ the particular circumstances of the individual case, coupled with a few not difficult rules of law, and an abundance of common sense, furnish the true criteria for the decision in the numerous classes of cases the facts whereof differ. To explain, —

§ 438. **Degree.** — Negligence and care are correlates, the former being the absence of the latter. And the required degree of care, the absence whereof is negligence, differs with

¹ Ante, § 150.

² *Grant v. Moseley*, 29 Ala. 302.

³ Ante, § 26; post, § 446.

⁴ **Other Definitions.** — The definition which perhaps has been oftenest quoted is that by Alderson, B. in *Blyth v. Birmingham Waterworks*, 11 Exch. 781, 784; namely, "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." In *Chicago, &c. Rld. v. Johnson*, 103 Ill. 512, 521, Scholfield, J. quotes this as "the generally approved definition," and adds "the more terse" one of the Illinois court in *Great Western Rld. v. Haworth*, 39 Ill. 346, 353, "The opposite of care and prudence — the omission to use the means reasonably necessary to avoid injury to others." A still shorter one occurs in *Carter v. Columbia, &c. Rld.* 19 S. C. 20, 24, "absence of due care." In *Nitro-glycerine Case*, 15 Wal. 524, 536, Field, J. follows Alderson's definition. In *Railroad v. Jones*,

95 U. S. 439, 441, Swayne, J. defines, "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done." In *Tonawanda Rld. v. Munger*, 5 Denio, 255, 266, by Beardsley, C. J., "Negligence is a violation of the obligation which enjoins care and caution in what we do." Willes, J. in *Skelton v. London, &c. Ry.* Law Rep. 2 C. P. 631, 636, observes, "Actionable negligence must consist in the breach of some duty." Brett, M. R. in *Heaven v. Pender*, 11 Q. B. D. 503, 507, defines, "Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property."

⁵ *Pennsylvania Rld. v. Fries*, 6 Norris, Pa. 234.

the cases.¹ For example, if a railroad track is so laid as to create extra danger, extra precautions are due from the parties working it.² A steam-engine requires in its management more care than a plough.³ And a steam railroad must be operated more circumspectly in the street of a city than in an uninhabited wood.⁴ Hence —

§ 439. **Rule as to Degree.** — It is impossible for the law to furnish, as to the degree of care, any rule like a yard stick applied to the measuring of cloth. The rule must be one which will vary with the facts. And such a rule, the only sort possible, has become well recognized by the courts; namely, that the care must be what a prudent and reasonable man, taking into view the common course of things, would deem to be required in the particular case. The words of the judges are not always exactly so, but such is the substance of the rule which has been variously expressed, and such in reason it should be.⁵ So that, for example, —

§ 440. **Illustrations.** — One building a dam or railroad embankment should provide against extraordinary freshets, occurring once in several years at irregular intervals,⁶ since a prudent man would inquire into the common course of things and anticipate them,⁷ but it is not negligence to omit precautions against a winter or other season exceptional beyond what any one could have foreseen.⁸ It may not be negligent

¹ *Pennsylvania Rld. v. Matthews*, 7 Vroom, 531; *Unger v. Forty-second Street, &c. Rld.* 51 N. Y. 497; *Kelsey v. Barney*, 2 Kernan, 425; *Cayzer v. Taylor*, 10 Gray, 274; *Fletcher v. Boston, &c. Rld.* 1 Allen, 9.

² *New York, &c. Ry. v. Randel*, 18 Vroom, 144.

³ *Meredith v. Reed*, 26 Ind. 334.

⁴ *Chicago, &c. Rld. v. Stumps*, 69 Ill. 409; *Fero v. Buffalo, &c. Rld.* 22 N. Y. 209.

⁵ *Blyth v. Birmingham Waterworks*, 11 Exch. 781, 784; *Smith v. London, &c. Ry.* Law Rep. 5 C. P. 98, 102; *Jager v. Adams*, 123 Mass. 26, 27; *Burkett v. Bond*, 12 Ill. 87; *Meredith v. Reed*, 26 Ind. 334 (whether the care

required by the circumstances is less or more, it is termed "ordinary care," p. 336); *Illinois, &c. Rld. v. Hetherington*, 83 Ill. 510; *Milwaukee, &c. Ry. v. Arms*, 91 U. S. 489, 495; *Tift v. Towns*, 53 Ga. 47; *Bizzell v. Booker*, 16 Ark. 308; *Nitro-glycerine Case*, 15 Wal. 524, 536, 537; *Weaver v. Ward*, Hob. 134; *Norfolk, &c. Rld. v. Ormsby*, 27 Grat. 455.

⁶ *Gray v. Harris*, 107 Mass. 492; *New York v. Bailey*, 2 Denio, 433; *Gulf, &c. Ry. v. Holliday*, 65 Texas, 512; *Sabine, &c. Ry. v. Hadnot*, 67 Texas, 503.

⁷ *Carriger v. East Tennessee, &c. Rld.* 7 Lea, 388.

⁸ *Blyth v. Birmingham Waterworks*,

for a working mason laying a brick wall to drop a brick, for this sort of accident is inseparable from the business; but, if the wall is on the line of a thronged street, his employer will be culpable should he not adopt safeguards to prevent persons from walking where falling bricks may hit them.¹ And an even greater responsibility lies on one who has snow and ice thrown from his roof into the street.² Still,—

§ 441. **Further of Degree — (Gross — Grossest).** — Bearing in mind the standard of negligence thus stated, we perceive that, though less of carefulness will be required in some circumstances than in others, there may be a gross or grossest negligence, more or less exceeding the standard.³ The excess will augment the damages.⁴ Or it may create a liability where otherwise there would be none.⁵ Now,—

§ 442. **Law or Fact.** — From this view as to the degree of negligence essential, it results that, while the rule determining its sufficiency is one of law for the court, it is necessarily a question of fact whether or not in the particular case there was negligence satisfying the rule; this, therefore, is for the jury.⁶ But the court decides what evidence to admit, and whether or not the collective evidence is so inadequate as to require a nonsuit or verdict for the defendant, or the setting

11 Exch. 781, 784; *Wright v. Wilmington*, 92 N. C. 156.

¹ *Jager v. Adams*, 123 Mass. 26.

² *Althorf v. Wolfe*, 22 N. Y. 355.

³ *Milwaukee, &c. Ry. v. Arms*, 91 U. S. 489, 495; *Wilson v. Brett*, 11 M. & W. 113, 115; *McPheeters v. Hannibal, &c. Rld.* 45 Mo. 22. See *Hinton v. Dibbin*, 2 Q. B. 646; *Railroad v. Lockwood*, 17 Wal. 357.

⁴ *Chicago, &c. Rld. v. Garvy*, 58 Ill. 83; *Grant v. McDonogh*, 7 La. An. 447.

⁵ *Ante*, § 61; *Burke v. De Castro, &c. Co.* 11 Hun, 354.

⁶ *Peoria, &c. Ry. v. Reed*, 17 Bradw. 413; *Myers v. Indianapolis, &c. Ry.* 113 Ill. 386; *Buell v. Chapin*, 99 Mass. 594; *Baltimore, &c. Rld. v. Fitzpatrick*, 35 Md. 32; *Buckley v. New York, &c. Rld.* 43 N. Y. Super. 187; *Shaber v.*

St. Paul, &c. Ry. 28 Minn. 103; *Ramsey v. Rushville, &c. Gravel Road*, 81 Ind. 394; *Healey v. City Passenger Rld.* 28 Ohio State, 23; *Texas, &c. Ry. v. Murphy*, 46 Texas, 356; *United States v. Taylor*, 5 McLean, 242; *Beers v. Housatonic Rld.* 19 Conn. 566; *Hanover Rld. v. Coyle*, 5 Smith, Pa. 396; *McCready v. South Carolina Rld.* 2 Strob. 356; *Lincoln v. Gillilan*, 18 Neb. 114; *Carpenter v. Eastern Transp. Line*, 67 Barb. 570; *Erd v. St. Paul*, 22 Minn. 443; *Woolfolk v. Macon, &c. Rld.* 56 Ga. 457; *Hunt v. Salem*, 121 Mass. 294; *Woods v. Boston*, 121 Mass. 337; *Barbo v. Bassett*, 35 Minn. 485; *Dexter v. McCready*, 54 Conn. 171; *Ferren v. Old Colony Rld.* 143 Mass. 197; *Illinois Cent. Rld. v. Cragin*, 71 Ill. 177; *Eureka Co. v. Bass*, 81 Ala. 200.

aside of a verdict.¹ And, upon a demurrer, the court passes on the sufficiency of the alleged negligence;² and so in other cases, where the facts are undisputed, and the conclusion from them is distinct and certain.³ Likewise, connected with this question of negligence, there may be others of pure law; such as whether the thing complained of is to be governed by the doctrine of negligence, or by some other.⁴ So that ordinarily negligence becomes a mixed question of law and fact.⁵ Whence it follows that there must be, and there are, more or less real or apparent differences of judicial opinion regarding particular combinations of fact and law. Thus it has been said, "The main object is to ascertain the facts. When they are ascertained, the question of negligence is for the court."⁶ On the other hand, an instruction to the jury that certain facts, if established, constitute negligence in matter of law has been adjudged erroneous.⁷ These two apparently contradictory rulings may not be inharmonious when applied each to its proper case. But it is not advisable, in our exposition of the law, to travel further here into evidence and practice, except as to —

¹ *St. Louis, &c. Ry. v. Vincent*, 36 Ark. 451; *Eppendori v. Brooklyn, &c. Rld.* 69 N. Y. 195; *Bridges v. North London Ry.* Law Rep. 7 H. L. 213; *Todd v. Old Colony, &c. Rld.* 3 Allen, 18; *Callahan v. Warne*, 40 Mo. 131; *New Jersey Rld. &c. Co. v. West*, 4 Vroom, 430; *Schilling v. Abernethy*, 2 Am. Pa. 437; *Atchison, &c. Rld. v. Smith*, 28 Kan. 541; *Simson v. London Gen. Omn. Co.* Law Rep. 8 C. P. 390; *Dublin, &c. Ry. v. Slattery*, 3 Ap. Cas. 1155; *Rose v. Northeastern Ry.* 2 Ex. D. 248; *Manzoni v. Douglas*, 6 Q. B. D. 145; *McClaren v. Indianapolis, &c. Rld.* 83 Ind. 319; *Davey v. London, &c. Ry.* 12 Q. B. D. 70.

² *Mathiason v. Mayer*, 90 Mo. 585.

³ *Fletcher v. Atlantic, &c. Rld.* 64 Mo. 484; *Chicago, &c. Rld. v. O'Connor*, 119 Ill. 586. But not where the conclusion from conceded facts is doubtful. *Mississippi Cent. Rld. v. Mason*, 51 Missis. 234.

⁴ *Howes v. Grush*, 131 Mass. 207; *Stainback v. Rae*, 14 How. U. S. 532; *Chidester v. Consolidated Ditch Co.* 59 Cal. 197; *Klatt v. Milwaukee*, 53 Wis. 196; *Ruter v. Foy*, 46 Iowa, 132; *Chicago, &c. Rld. v. Johnson*, 103 Ill. 512; *Claxton v. Lexington, &c. Rld.* 13 Bush, 636; *Lewis v. Bulkley*, 4 Daly, 156.

⁵ *Nolan v. New York, &c. Rld.* 53 Conn. 461; *Pittsburgh, &c. Rld. v. Evans*, 3 Smith, Pa. 250.

⁶ *Bynum, J. in Doggett v. Richmond, &c. Rld.* 78 N. C. 305, 312. In *Metro-politan Ry. v. Jackson*, 3 Ap. Cas. 193, 200, Lord Cairns, Ch. said: "It is impossible to lay down any rule except . . . that, from any given state of facts, the judge must say whether negligence can legitimately be inferred, and the jury whether it ought to be inferred." And see post, § 444, note.

⁷ *Myers v. Indianapolis, &c. Ry.* 113 Ill. 386; *Pennsylvania Co. v. Frana*, 112 Ill. 398.

§ 443. **Presumptions and Burden of Proof.** — Both courts and juries take notice of the common course of events.¹ So that there are injuries which, in the circumstances attending them, create the presumption of fact that they come from the defendant's negligence; as, if a steam boiler bursts, the party working it has the burden of showing due care, because experience teaches us that negligence is the ordinary source of this sort of accident.² And where a stage-coach is upset, injuring a passenger, negligence is *prima facie* presumed to be the cause, casting the burden on the defendant to prove the contrary.³ But in most accidents, something more than the mere fact of injury must be established before negligence will be inferred;⁴ as, where a traveller sues for damages from a defective highway.⁵ Yet if a further step appears and, for example, a railroad accident is shown to have been caused by a defect in the road, cars, or machinery, or by lack of care in those employed, or by any other omission which the company in fulfilment of its duty to carry passengers safely should have supplied, the negligence which the case requires is presumed.⁶ So likewise, in one's action for the burning of his buildings by fire communicated from the defendant's premises, proof that sparks from the latter's smoke-stack did it, makes a *prima facie* case.⁷

§ 444. **Act of Negligence** — (Law or Fact). — In spite of

¹ Gaynor v. Old Colony, &c. Ry. 100 Mass. 208, 211, 212; Rex v. Luffe, 8 East, 193, 202; Boullemet v. The State, 28 Ala. 83; Crafter v. Metropolitan Ry. Law Rep. 1 C. P. 300.

² Illinois Cent. Rld. v. Phillips, 49 Ill. 234, 239.

³ Stokes v. Saltonstall, 13 Pet. 181; Farish v. Reigle, 11 Grat. 697; Sander-son v. Frazier, 8 Colo. 79; Ware v. Gay, 11 Pick. 106. For other illustrations, see Mulcairns v. Janesville, 67 Wis. 24; Miller v. St. Louis, &c. Ry. 90 Mo. 389; Wilkerson v. Corrigan Consol. St. Ry. 26 Mo. Ap. 144.

⁴ Brown v. Congress, &c. Ry. 49 Mich. 153; The Buckeye, 7 Bis. 23;

Hutchinson v. Boston Gas-light Co. 122 Mass. 219; Kendall v. Boston, 118 Mass. 234; Oyshterbank v. Gardner, 49 N. Y. Super. 263; Robinson v. Fitchburg, &c. Rld. 7 Gray, 92; Hammack v. White, 11 C. B. N. s. 588, 8 Jur. N. s. 796; Scott v. London, &c. Docks, 3 H. & C. 596, 11 Jur. N. s. 204; Cox v. Burbidge, 13 C. B. N. s. 430, 9 Jur. N. s. 970; Pittsburgh, &c. Ry. v. Hixon, 110 Ind. 225.

⁵ Kavanaugh v. Janesville, 24 Wis. 618.

⁶ Meier v. Pennsylvania Rld. 14 Smith, Pa. 225; Seybolt v. New York, &c. Rld. 95 N. Y. 562.

⁷ Lawton v. Giles, 90 N. C. 374.

the rule that the question of negligence is for the jury,¹ the other rule which requires the judge to pass upon the admission of evidence, and its effect, and the sufficiency of the allegations, renders it necessarily a matter of law whether or not in a given case a particular act or omission is negligence.² For without dealing with this question, one presiding in this class of litigation could not perform the judicial functions. There is also a distinction between negligence and the evidence of it. Now, —

§ 445. **Illustrations of Negligence.** — It is not negligence, as we have already seen,³ for one to run extreme risks to save human life;⁴ for example, a railroad engineer who could jump from his engine is not negligent though, for the preservation of the passengers, he stays at his post and faces a collision.⁵ Nor is a mother negligent who leaps to rescue her child from an approaching train.⁶ For illustrations of another sort, a child of thirteen has been held not to be negligent in stopping by a fence to look at something across the street.⁷ In the absence of special facts, one may prudently act on the presumption that another will fulfil his contract⁸ or his statutory duty,⁹ and it is negligence not to do what a statute or valid by-law requires,¹⁰ — propositions which in vari-

¹ Ante, § 442.

² Lord Chancellor Cairns put this in words a little different; namely, that "the judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred." *Metropolitan Ry. v. Jackson*, 3 Ap. Cas. 193, 197; ante, § 442, note. Still it is common and convenient in judicial language, distinguishing now negligence from the evidence of it, to designate particular facts whereof the court permits proof, as facts of negligence, while yet the jury must say, not only whether those facts exist, but also whether or not, under the entire proofs before them, they in the particular instance fill the law's definition of negli-

gence as the court has laid it down to them.

³ Ante, § 125.

⁴ *Eckert v. Long Island Rld.* 43 N. Y. 502.

⁵ *Pennsylvania Co. v. Roney*, 89 Ind. 453. But a passenger who leaps from a moving train merely to prevent his family's being in mental distress about him is negligent. *Lake Shore, &c. Ry. v. Bangs*, 47 Mich. 470.

⁶ *Donahoe v. Wabash, &c. Ry.* 83 Mo. 560.

⁷ *Hussey v. Ryan*, 64 Md. 426.

⁸ *Newson v. New York, &c. Rld.* 29 N. Y. 383; *Neff v. Broom*, 70 Ga. 256, 259.

⁹ *Kennayde v. Pacific Rld.* 45 Mo. 255; *Ransom v. Chicago, &c. Ry.* 62 Wis. 178; *Daniels v. Clegg*, 28 Mich. 32.

¹⁰ *Toledo, &c. Ry. v. Deacon*, 63 Ill.

ous circumstances are so complicated with other doctrines as to seem not universal.¹ One is negligent who so keeps a hayrick on the extremity of his land that his neighbor's house is burned from its spontaneous ignition.² Assuming one to have the right to float his logs on a river, it is actionable negligence in him to put them in a large quantity upon the ice and, without looking after them, suffer them to create a dam in a thaw, wherefrom the river works a channel to the injury of adjoining lands.³ On the other side, a common carrier is entitled to assume that a package committed to him in the ordinary way contains nothing dangerous, therefore it is not negligence in him to accept such a package; so that, if a third person is injured by the explosion of its contents, he is not required to make good the damages.⁴ To perform a natural act, under a sudden impulse of fear created by the circumstances, is not negligence, though the facts disclose afterward that the act was not prudent.⁵ These illustrations will suffice for the present purpose; others appear throughout the volume.

§ 446. **Duty to Complaining Party — Légal Injury.** — To sustain an action for negligence the plaintiff must have suffered

91; *Terre Haute, &c. Rld. v. Black*, 18 Bradw. 45; *Louisville, &c. Rld. v. Connor*, 9 Heisk. 19; *Hill v. Louisville, &c. Rld.* 9 Heisk. 823; *Memphis, &c. Rld. v. Smith*, 9 Heisk. 860; *Houston, &c. Ry. v. Wilson*, 60 Texas, 142; *New Orleans, &c. Rld. v. Toulme*, 59 Missis. 284; *Missouri River Packet Co. v. Hannibal, &c. Rld.* 79 Mo. 478; *Georgia Rld. v. Carr*, 73 Ga. 557; *Correll v. Burlington, &c. Rld.* 38 Iowa, 120; *Messenger v. Pate*, 42 Iowa, 443.

¹ *Wabash, &c. Ry. v. Weisbeck*, 14 Bradw. 525; *Chicago, &c. Rld. v. Jones*, 59 Missis. 465; *Townley v. Chicago, &c. Ry.* 53 Wis. 626; *Payne v. Chicago, &c. Ry.* 39 Iowa, 523; *Dodge v. Burlington, &c. Rld.* 34 Iowa, 276; *Wabash, &c. Ry. v. Central Trust Co.* 23 Fed. Rep. 738; *Philadelphia, &c. Rld. v. Stebbing*, 62 Md. 504; *Missouri Pacific Ry. v. Pierce*, 33 Kan. 61; *Haas v.*

Grand Rapids, &c. Rld. 47 Mich. 401; *Wohlfahrt v. Beckert*, 92 N. Y. 490; *Watier v. Chicago, &c. Ry.* 31 Minn. 91.

² *Vaughan v. Menlove*, 3 Bing. N. C. 468, 4 Scott, 244, 7 Car. & P. 525. For another illustration of the principle, see *Tissue v. Baltimore, &c. Rld.* 2 Am. Pa. 91.

³ *George v. Fisk*, 32 N. H. 32.

⁴ *Nitro-glycerine Case*, 15 Wal. 524.

⁵ *Jones v. Boyce*, 1 Stark. 493; *Filer v. New York Cent. Rld.* 49 N. Y. 47; *Buel v. New York Cent. Rld.* 31 N. Y. 314; *Twomley v. Central Park, &c. Rld.* 69 N. Y. 158; *Siegrist v. Arnot*, 10 Mo. Ap. 197; *Karr v. Parks*, 40 Cal. 188; *Mark v. St. Paul, &c. Ry.* 30 Minn. 493; *Wesley City Coal Co. v. Healer*, 84 Ill. 126; *Coulter v. American, &c. Exp. Co.* 56 N. Y. 585.

a legal injury¹ whereof he is entitled to complain.² Therefore, however great the defendant's negligence, if it was committed without violating any duty which he owed either directly to the plaintiff, or to the public in a matter whereof he had the right to avail himself,³ as explained in the earlier chapters of this volume, there is nothing which the law will redress.⁴ For example, one who finds a thing which is lost, so that it will be his unless the owner appears and claims it, is under no duty to keep it carefully; and an action will not lie against him if it is cloth and becomes moth-eaten, or a horse and it is not fed.⁵ And where a railroad is under no duty to keep in repair a private crossing, the land-owner for whose benefit it exists cannot recover the damages to his wagon sustained by its being out of repair.⁶

§ 447. **An Accident**—may be of the inevitable sort, for which the party must suffer without compensation, as explained in a preceding chapter.⁷ Or it may come from negligence, in which case only, it is actionable.⁸ For—

§ 448. **Resulting from Negligence.**—Always an injury, to be actionable as negligence, must result from the negligence.⁹

§ 449. **Other Doctrines,**—governing the various complications of fact liable to arise, are explained in the following sub-titles.

II. *Negligence combining with other Causes.*¹⁰

§ 450. **The Leading Doctrine**—governing this sub-title has already been stated; namely, that where two or more causes

¹ Ante, § 143, 150.

² Ante, § 22-65.

³ Atkinson v. Newcastle, &c. Water-works, Law Rep. 6 Ex. 404; Victory v. Baker, 67 N. Y. 366; Tonawanda Rld. v. Muuger, 5 Denio, 255, 266, 267.

⁴ Kahl v. Love, 8 Vroom, 5; Gwynn v. Duffield, 66 Iowa, 708; Coughtry v. Globe Woollen Co. 56 N. Y. 124.

⁵ Mulgrave v. Ogden, Cro. Eliz. 219.

⁶ Mann v. Chicago, &c. Ry. 86 Mo. 347.

⁷ Ante, § 155 et seq.; Hodgson v. Dexter, 1 Cranch C. C. 109; Read v. Pennsylvania Rld. 15 Vroom, 280;

Bishop v. Union Rld. 14 R. I. 314; Wright v. Wilmington, 92 N. C. 156.

⁸ McGrew v. Stone, 3 Smith, Pa. 436; Cole v. Fisher, 11 Mass. 137, 138; The Lotty, Olcott, 329; Atkinson v. Goodrich Transp. Co. 60 Wis. 141; Townsend v. Susquehannah Turnpike, 6 Johns. 90; Beach v. Parmeter, 11 Harris, Pa. 196.

⁹ Ante, § 38; Pennsylvania Co. v. Marion, 104 Ind. 239; East Tennessee, &c. Rld. v. King, 81 Ala. 177.

¹⁰ Compare with chapter commencing post, § 517.

operate together, — not where, after one has begun, an independent one comes in to produce its own different result,¹ — the party putting any one in motion is responsible for the entire consequences the same as though it were the sole cause. And it is not necessary that the beginning of their operation should be simultaneous.² Thus, —

§ 451. **Defendant and Third Person.** — It is no defence by one sued for negligence that, though his negligence contributed to the injury, another's contributed also.³ For example, in a case of collision between stage-coaches, if the driver of the defendant's coach was wanting in skill and prudence, no recklessness of the other driver will exempt him from liability to another.⁴ So, in a suit against a railroad for setting fire to the plaintiff's elevator by sparks carelessly thrown from the locomotive, if it appears that they fell, not upon the elevator, but upon a third person's building which was consumed, it will not avail the defendant that the fire was communicated thence⁵ through the carelessness of the third person.⁶ The reason of this has already been stated, and it has been shown⁷ that a contrary doctrine, incautiously held in Massachusetts⁸ and one or two other States, is utterly without support either in general adjudication or in just legal principle.

§ 452. **Defendant and Inanimate Thing.** — The same rule applies also when some irresponsible force or inanimate thing co-operates with the defendant's negligence to produce the harm.⁹ Thus, where a city had carelessly left an excavation

¹ Ante, § 42.

² Ante, § 39, 45, 46; *Terre Haute, &c. Rld. v. Buck*, 96 Ind. 346.

³ *Grand Trunk Ry. v. Cummings*, 106 U. S. 700, 702; *Griggs v. Fleckenstein*, 14 Minn. 81, 93; *Slater v. Merse- reau*, 64 N. Y. 138; *Mills v. Armstrong*, 13 Ap. Cas. 1.

⁴ *Peck v. Neil*, 3 McLean, 22.

⁵ *Hoyt v. Jeffers*, 30 Mich. 181; *Butcher v. Vaca Valley, &c. Rld.* 67 Cal. 518; *Crandall v. Goodrich Transp. Co.* 16 Fed. Rep. 75; *Ryan v. New York Cent. Rld.* 35 N. Y. 210.

⁶ *Small v. Chicago, &c. Rld.* 55 Iowa, 582; *s. p. Johnson v. Chicago, &c. Ry.* 31 Minn. 57.

⁷ Ante, § 39, note.

⁸ *Shepherd v. Chelsea*, 4 Allen, 113, 114; *Priest v. Nichols*, 116 Mass. 401. As more nearly conforming to the general doctrine, see *Derry v. Flitner*, 118 Mass. 131; *Churchill v. Holt*, 131 Mass. 67.

⁹ Ante, § 39. And see *Gubasko v. New York*, 12 Daly, 183.

in the street, and a person attempting to avoid the threatened kick of a mule fell into it and was injured, the city was held to be liable.¹ But—

§ 453. **Independent Force.**—If, while the negligence is working, an independent force comes along and produces an injury not its natural and probable effect, the author of the negligence is not responsible, as explained in a previous chapter.²

III. *Proximate and Remote Effects.*

§ 454. **Already.**—As seen in the last sub-title, so here, the general doctrine of the topic, as pervading the entire law of non-contract wrongs, has been already in a preceding chapter explained.³ It is proposed here to give only some brief illustrations of the doctrine in its special application to negligence.

§ 455. **General.**—The negligence, to be actionable, must be what is technically termed the proximate cause of the injury,⁴—not necessarily the only cause⁵ or most proximate.⁶ And it is ordinarily a question of fact for the jury, under instructions from the court, whether it was thus proximate or not.⁷ To illustrate,—

§ 456. **Instances.**—Though the immediate cause of an accident is the breaking of a chain, an act likely to induce the breaking may be deemed the proximate cause of the accident.⁸ And, in line with the doctrine of the last sub-title, if one neg-

¹ Bassett v. St. Joseph, 53 Mo. 290.

² Ante, § 42, 43; Pennsylvania Co. v. Whitlock, 99 Ind. 16; Booth v. Sanford, 52 Conn. 481; Muster v. Chicago, &c. Ry. 61 Wis. 325.

³ Ante, § 40–48.

⁴ Howe v. Young, 16 Ind. 312; Kline v. Central Pacific Rld. 37 Cal. 400; Needham v. San Francisco, &c. Rld. 37 Cal. 409; Pittsburgh, &c. Ry. v. Conn, 104 Ind. 64; Bishop v. Pentland, 7 B. & C. 219; Salem Bank v. Gloucester Bank, 17 Mass. 1, 32; Harriss v. Mabry, 1 Ire. 240; Pennsylvania Rld. v. Weber, 22 Smith, Pa. 27; Doggett v. Richmond, &c. Rld. 78 N. C.

305; Crandall v. Goodrich Transp. Co. 16 Fed. Rep. 75; Fawcett v. Pittsburg, &c. Ry. 24 W. Va. 755; Oil City Gas Co. v. Robinson, 3 Out. Pa. 1; Ryan v. New York Cent. Rld. 35 N. Y. 210; Marble v. Worcester, 4 Gray, 395.

⁵ Ante, § 450.

⁶ Scott v. Hunter, 10 Wright, Pa. 192.

⁷ Milwaukee, &c. Ry. v. Kellogg, 94 U. S. 469; Reiper v. Nichols, 31 Hun, 491; Dunn v. Cass Ave. &c. Ry. 21 Mo. Ap. 188; Savage v. Chicago, &c. Ry. 31 Minn. 419.

⁸ King v. Ohio, &c. Ry. 25 Fed. Rep. 799.

ligently leaves combustibles, and a second person negligently sets them on fire to the damage of a third, the act of either the first or of the second person may be treated as the proximate cause of the loss.¹ Where the gate of a wire fence beside a railroad is negligently left open, and horses escape through it to the railroad track, then are frightened by the engine and run against the fence and are injured, the leaving open of the gate may be deemed the proximate cause of the injury.²

§ 457. **Natural and Probable Consequences.** — When a cause has been put in motion, the author of it is responsible for all its natural and probable consequences, which are not too remote.³ And it is not necessary that the evil result should have been in form foreseen.⁴ For example, horses frightened in a street are liable to run away and do damage; so that, if the whistle of a locomotive engine is needlessly and wantonly sounded near a highway, causing a team of horses to run and kill another horse, the owner of the latter may recover his damages of the railroad.⁵

IV. *Contributory Negligence.*

§ 458. **Doctrines contrasted.** — Where the joint negligence of the defendant and another has produced the complained-of injury, the defendant's liability to pay for it depends upon whether the other was the plaintiff or a third person. In the latter case, we have seen, he is answerable the same as though he had done all without help.⁶ In the former, it is about to be explained that he altogether escapes. Now, —

§ 459. **Defined.** — The doctrine of contributory negligence is, that one cannot recover compensation for an injury from any negligence, however it may be deemed another's, into which negligence of his own has to any degree⁷ entered

¹ Johnson v. Chicago, &c. Ry. 31 Minn. 57.

² Savage v. Chicago, &c. Ry. 31 Minn. 419.

³ Ante, § 40-48; Weick v. Lander, 75 Ill. 93.

⁴ Hill v. Winsor, 118 Mass. 251.

⁵ Billman v. Indianapolis, &c. Rld. 76 Ind. 166.

⁶ Ante, § 451.

⁷ New Jersey Exp. Co. v. Nichols, 4 Vroom, 434; Hawkins v. Cooper, 8 Car.

as a proximate cause,¹ contributing to the complained-of result.²

§ 460. **Why?**—In many of the judicial expositions, the reason of this doctrine—the ground whereon it rests—seems to have eluded notice.³ Obviously it is a particular

& P. 473; *Louisville, &c. Ry. v. Shanks*, 94 Ind. 598; *Artz v. Chicago, &c. Rld.* 38 Iowa, 293; *Kansas Pacific Ry. v. Peavey*, 29 Kan. 169; *Monongahela City v. Fischer*, 1 Am. Pa. 9, 14, Paxson, J. observing: "The doctrine of this court has always been, that if the negligence of the party contributed in any degree to the injury he cannot recover. This is a safe rule, easily understood, and cannot well be frittered away by the jury. But if we substitute the word 'material' for the word 'any' we practically abolish the rule, for a jury can always find a way to avoid it. The rule itself is valuable, and rests upon sound principles. We are not disposed to allow it to be undermined." See post, § 468.

¹ *Flynn v. San Francisco, &c. Rld.* 40 Cal. 14; *Newhouse v. Miller*, 35 Ind. 463; *Fowler v. Baltimore, &c. Rld.* 18 W. Va. 579; *Gunter v. Graniteville Manuf. Co.* 15 S. C. 443; *Levy v. Carondelet Canal and Nav. Co.* 34 La. An. 180; *Yahn v. Ottumwa*, 60 Iowa, 429.

² *Oil City Gas Co. v. Robinson*, 3 Out. Pa. 1; *Lake Shore, &c. Ry. v. Bangs*, 47 Mich. 470; *Wabash, &c. Ry. v. Weisbeck*, 14 Bradw. 525; *Wabash, &c. Ry. v. Thompson*, 15 Bradw. 117; *Chicago, &c. Rld. v. Rogers*, 17 Bradw. 638; *Cunard Steamship Co. v. Carey*, 119 U. S. 245; *Gonthier v. New Orleans, &c. Rld.* 28 La. An. 67; *The State v. Baltimore, &c. Rld.* 58 Md. 482; *Virtue v. Birde*, 2 Lev. 196; *Abernethy v. Van Buren*, 52 Mich. 383; *Butterfield v. Forrester*, 11 East, 60; *Kentucky Cent. Rld. v. Thomas*, 79 Ky. 160; *Barley v. Chicago, &c. Rld.* 4 Bis. 430; *Chicago, &c. Ry. v. Donahue*, 75 Ill. 106; *Quimby v. Woodbury*, 63 N. H. 370; *Barlow v. McDonald*, 39 Hun, 407; *Patrick v. Pote*, 117 Mass.

297; *Gribble v. Sioux City*, 38 Iowa, 390; *Kelly v. Hendrie*, 26 Mich. 255; *Stiles v. Geesey*, 21 Smith, Pa. 439; *Flemming v. Western Pac. Rld.* 49 Cal. 253; *Behan v. New York*, 24 Fed. Rep. 239; *St. Louis, &c. Ry. v. Mathias*, 50 Ind. 65; *Hurst v. Burnside*, 12 Oregon, 520; *Greenland v. Chaplin*, 5 Exch. 243; *Lord v. Hazeltine*, 67 Maine, 399; *Arctic Fire Ins. Co. v. Austin*, 69 N. Y. 470; *Drake v. Mount*, 4 Vroom, 441; *Griggs v. Fleckenstein*, 14 Minn. 81; *Donaldson v. Milwaukee, &c. Ry.* 21 Minn. 293; *Brown v. Milwaukee, &c. Ry.* 22 Minn. 165; *Lilley v. Fletcher*, 81 Ala. 234.

³ For example, in *The Bernina*, 12 P. D. 58, 89, Lindley, L. J. observes: "Why, in such a case, the damages should not be apportioned, I do not profess to understand. However, the law on this point is settled, and not open to judicial discussion." Still he mentions, referring to *Greenland v. Chaplin*, 5 Exch. 243, that "the jury cannot take the consequences and divide them in proportion according to the negligence of the one or the other party." And we have many cases which state the reason to be, that the law has no means to separate an aggregate of damage jointly produced, and say how much of it came from the plaintiff's intermingling negligence. *Heil v. Glanding*, 6 Wright, Pa. 493, 499, and *Needham v. San Francisco, &c. Rld.* 37 Cal. 409, are examples. But, in fact, the admiralty has always done something like this, as we shall see in the next sub-title. Post, § 473. And this suggests that if, seeking for a reason, we were not particular whether or not we found the true one, we might attribute the doctrine, and with much plausibility, to the limitations from the procedure explained ante,

instance within the wider doctrine, that a court of law will not give redress to a plaintiff whose case shows wrong in himself in the very matter whereof he complains. And the reason for this wider doctrine, together with its limits, is stated in a preceding chapter in connection with the doctrine itself.¹ A familiar expression of it is, that one coming into court must come with "clean hands."² And a familiar illustration is, that, if two persons join in a tort and one of them pays the damages, he cannot enforce contribution against the other,³ or if a woman yields to her seducer she cannot maintain a suit for the wrong.⁴ To reject the rule of contributory negligence, therefore, would not only reverse a line of decisions extending back to early times, but it would likewise take away from our legal structure a foundation pillar whereon a much larger portion of it than mere negligence reposes. Now, —

§ 461. **Judicial Tangle.** — The cases and their accompanying opinions, on this subject, are immensely numerous, and together they constitute a tangle from which no one who enters it can extricate himself simply by following the words of the judges. But, looking at the doctrine in the light of its true reason, as just stated, we shall find our way sufficiently plain; and the adjudications will not appear more inharmonious than on many other subjects. Thus, —

§ 462. **Proximate.** — Since the negligence, to be actionable, must be the proximate cause of the injury, the contributory negligence must also, to bar the action, be proximate;⁵ for otherwise the plaintiff would not be in fault about the same thing whereof he complains. His fault would pertain to a collateral matter, which, we have seen,⁶ does not bar. Within this principle, —

§ 66-69. For the admiralty sits without a jury, and its practice is flexible. Yet there is nothing in the jury practice forbidding the defendant to recoup his damages out of the plaintiff's, though he could not go further and obtain a verdict for any excess.

¹ Ante, § 54-65.

² 2 Bishop Mar. & Div. § 75.

³ Ante, § 56.

⁴ Ante, § 57.

⁵ Cases cited ante, § 459; *Doggett v. Richmond, &c. Rld.* 78 N. C. 305; *Pendleton Street Rld. v. Stallmann*, 22 Ohio State, 1, 20.

⁶ Ante, § 54, 59.

§ 463. **Negligence as New Force.**—If, while one is negligent,—perhaps the expression should be, in a state of negligence,—another negligently employs an independent force, which, availing itself of the occasion afforded by the former's negligence, works a harm not its natural and probable consequence, but an independent harm, the first negligence is not contributory to the second.¹ There are difficulties in applying this principle, but they are only such as are inseparable from the infinite complications of human affairs, and the diversities of opinions upon them. To illustrate: the owners of a colliery had a siding to a railroad under other ownership. Over the siding they had a bridge. The colliery people were accustomed to load their wagons on this siding; the railroad people, to take them away loaded and return them empty. One Saturday evening, after the workmen had left the colliery, the railroad men returned to the siding a quantity of empty wagons, one of which was too high to go under the bridge by reason that another wagon becoming disabled had to be loaded upon it. Sunday night, after dark, the railroad men brought along another quantity of these empty wagons, pushed them upon the siding until the one too high hit the bridge, then applied too strong a force, and did damage. Should the railroad sustain the loss? A jury, under the instruction that there was here evidence for their consideration, and that the plaintiffs could not recover if their own negligence contributed to the accident, said no. The Court of Exchequer unanimously set aside the verdict for error in the instruction as applied to this special state of facts, the Exchequer Chamber unanimously reversed this decision, and the House of Lords unanimously reversed the Exchequer Chamber. The facts are of a class to which the doctrine of this section is fairly applicable, but none of the judges put the case quite so in terms.² Other facts illustrating the doc-

¹ Ante, § 42, 59–63, 453; O'Brien v. McGlinchy, 68 Maine, 552.

² Radley v. London, &c. Ry. Law Rep. 9 Ex. 71, in the Exchequer; Law Rep. 10 Ex. 100, in the Exchequer Chamber; 1 Ap. Cas. 754, in the House

of Lords. It is perceived that the instruction lays down the ordinary doctrine of contributory negligence, yet it does not go farther. Lord Penzance, in delivering in the House of Lords an opinion concurred in by the other law

trine are sufficiently numerous in the books, and they are not the less effective though the judges have not always reasoned upon them precisely in our present form.¹ Thus, —

lords, after stating this general doctrine, adds : "But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." p. 759 of *Ap. Cas.*, on the authority of *Davies v. Mann*, 10 M. & W. 546, and *Tuff v. Warman*, 5 C. B. N. s. 573. The reader perceives that, however just this proposition may be as applied to the special facts in hand, if abstractly viewed it is simply a flat denial of the general doctrine of negligence itself. And it may profitably be added here, that the great stumbling-block for law students, for not a few practising lawyers, and for more of the judges than it would be pleasant to say, is that, separating utterances of courts from the facts which prompted them, they accept them as doctrine, and follow them to the confusion both of themselves and of their hearers. Thus, Lord Penzance here says, that contributory negligence does not bar a plaintiff's recovery "if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened." Now, there is no possible case in which a defendant is liable "if he could *not* have avoided the mischief;" every case of actionable negligence involves the element that he "*could* have avoided" it. So that, to say that the doctrine of contributory negligence does not apply to a case wherein the defendant could have prevented the mischief "by the exercise of

ordinary care and diligence," is equivalent to the assertion that it does not apply to any case, and that it has no existence in the law. Subsequently to the decision of the three cases above referred to in this note, Lindley, L. J., citing them, stated the doctrine to which I have quoted Lord Penzance, thus : "But if the plaintiff can show that, although he has himself been negligent, the real and proximate cause of the injury sustained by him was the negligence of the defendant, the plaintiff can maintain an action." *The Bernina*, 12 P. D. 58, 89. Looking at these two utterances abstractly, their difference is very marked ; yet in the later case the learned judge simply repeats in idea what he deems to have been laid down in the earlier. Evidently in the later, the judicial mind had in contemplation a broader view of facts than in the earlier. And the later utterance is a nearer approximation to the doctrine as stated in the text of this section than the earlier. Neither of these two learned persons had occasion to contemplate the subject under the broader light from which it is the duty of a legal author to speak. In this view, I regard these English cases, and the American ones which in words follow them, as affirming, rather than conflicting with, the doctrine laid down in the text. At all events, the doctrine is founded on what is immutable in the common law, and is subject only to legislative control. See the American cases of *Gunter v. Wicker*, 85 N. C. 310 ; *Burham v. St. Louis, &c. Rld.* 56 Mo. 338 ; *Swigert v. Hannibal, &c. Rld.* 75 Mo. 475 ; *North-eastern Central Ry. v. The State*, 31 Md. 357 ; *Gunter v. Graniteville Manuf. Co.* 15 S. C. 443 ; *Pendleton Street Rld. v. Stallmann*, 22 Ohio State, 1, 20 ;

¹ Bishop Con. § 12.

§ 464. **Instances.** — Where one negligently left his donkey fettered in a highway, and another recklessly drove his wagon against it and killed it, the lack of carefulness in the former being simply a state of things whereof the latter's carelessness took advantage,¹ the former's negligence was not contributory, and the action was maintainable.² So from a house standing beside a railroad the owner left a pane of glass partly out, then a locomotive was driven past it at an excessive speed, throwing a spark through the broken pane into the house, and doing damage; here, though the house-owner was negligent in not mending his window, the burning of the building was not the natural and probable consequence of the hole, and the spark was thrown through it by means of a negligent force quite disconnected from his negligence, therefore he could maintain the action.³ To do a thing forbidden by a statute may, we have seen,⁴ be treated as negligence; but, if one is driving his cattle to market on Sunday, contrary to a statutory prohibition, he may recover for an injury

Houston, &c. Cent. Ry. v. Carson, 66 Texas, 345; *Morrissey v. Wiggins Ferry*, 47 Mo. 521; *Green v. Erie Ry.* 11 Hun, 333; *Goltz v. Winona, &c. Rld.* 22 Minn. 55; *Klipper v. Coffey*, 44 Md. 117; *Mississippi Cent. Rld. v. Mason*, 51 Missis. 234; *Johnson v. Canal, &c. Rld.* 27 La. An. 53; *Manly v. Wilmington, &c. Rld.* 74 N. C. 655.

¹ Ante, § 42, 43, 59, 61.

² *Davies v. Mann*, 10 M. & W. 546, Parke, B. observing, "The judge simply told the jury that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway was no answer to the action, unless the donkey's being there was the immediate cause of the injury; and that, if they were of opinion that it was caused by the fault of the defendant's servant in driving too fast, . . . the mere fact of putting the ass upon the road would not bar the plaintiff of his action. All that is perfectly correct; for, although the ass may have been wrongfully there,

still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief." p. 549. This was putting the case on the ground of proximate and remote cause, and was not objectionable. Ante, § 462. But the facts better illustrate our present doctrine.

³ *Martin v. Western Union Rld.* 23 Wis. 437. In this case, as in that of the donkey and in great numbers of other cases, I have not considered it important to inquire whether or not the reasoning of the law, which I endeavor to follow, corresponds with that of the individual judge pronouncing the opinion. Compare this case with *Alpern v. Churchill*, 53 Mich. 607; *Aaron v. Second Ave. Rld.* 2 Daly, 127; *Yik Hon v. Spring Valley Waterworks*, 65 Cal. 619; *Hatfield v. Chicago, &c. Ry.* 61 Iowa, 434; *Greenland v. Chaplin*, 5 Exch. 243; *Kansas Pac. Ry. v. Brady*, 17 Kan. 380.

⁴ Ante, § 445.

to them not naturally consequent thereon, proceeding from another's negligence.¹ But —

§ 465. **Distinctions as to this.** — Slight changes in the facts will reverse the legal result. If, for example, the owner of the donkey had left it fettered on a railroad track over which trains were passing every half-hour, and it had been unintentionally yet carelessly killed, no one would doubt that his negligence had contributed to the accident, and he could not recover. And where, in an ordinary highway, a woman hitched her horse so that the carriage projected into the travelled part, and a wagon unaccompanied by the wagoner (a fact distinguishing this from the donkey case) came along and did damage to the carriage, her negligence was held to be contributory, so the action was not maintainable.² If a railroad negligently sets a house on fire, it is not liable for a package of money burned therein, when the owner was negligent in not taking it away at a safe opportunity which occurred.³ Here the plaintiff's negligence is simultaneous with the defendant's, leaving no ground for excepting the case out of the foregoing rule.

§ 466. **Discovered Negligence.** — It is sometimes very correctly said that, if one discovers another to have been negligent, he must take precautions accordingly; omitting which, he is liable to the other for the damages which follow from his own want of care.⁴ For, however nearly related two separate negligences may be, the one cannot bar an action for the other unless it is contributory;⁵ and, though an unseen position might contribute to an accident, a discovered one cannot.⁶

¹ *Sutton v. Wauwatosa*, 29 Wis. 21. For more of this see ante, § 62-64. Compare with *Needham v. San Francisco, &c. Rld.* 37 Cal. 409.

² *Stiles v. Geesey*, 21 Smith, Pa. 439. Compare with *Morris v. Phelps*, 2 Hilton, 38; *Hoboken Land, &c. Co. v. Lally*, 19 Vroom, 604.

³ *Toledo, &c. Ry. v. Pindar*, 53 Ill. 447. Compare with *Chicago, &c. Ry. v. Donahue*, 75 Ill. 106.

⁴ *Cooper v. Central Rld.* 44 Iowa, 134; *Swigert v. Hannibal, &c. Rld.* 75

Mo. 475; *Straus v. Kansas City, &c. Rld.* 75 Mo. 185; *Morris v. Chicago, &c. Ry.* 45 Iowa, 29; *Zimmerman v. Hannibal, &c. Rld.* 71 Mo. 476; *Woods v. Jones*, 34 La. An. 1086, 1088.

⁵ Ante, § 459; *Central Rld. v. Van Horn*, 9 Vroom, 133.

⁶ *Omaha Horse Ry. v. Doolittle*, 7 Neb. 481; *Snyder v. Pittsburgh, &c. Ry.* 11 W. Va. 14; *O'Rourke v. Chicago, &c. Ry.* 44 Iowa, 526; *Citizens Street Ry. v. Steen*, 42 Ark. 321.

A failure to discern the position will be negligence or not according to the circumstances.¹ A familiar illustration of this rule is where one driving upon a highway sees another on the wrong side; if now he proceeds on, as though the other were on the right side, and a collision occurs, he is responsible.²

§ 467. **Inaccurate Test.** — A test obviously inaccurate, yet sometimes appearing in the reports, is, that a negligence is to be deemed contributory or not according as, without it, the accident would or would not have occurred.³ This test would reverse the result in numberless plain cases, about which there is no dispute; as, in the case just stated, where one is liable for driving over another whom he sees to be on the wrong side of the way.⁴ If the injured person had not been negligent, — that is, if he had been on the right side, — he would not have suffered, and the test would bar him of his right, contrary to the universally accepted doctrine. Moreover, this test evidently proceeds from misapprehension of the reason⁵ on which the rule of contributory negligence rests; therefore, as well as because it is practically misleading, it should be rejected.⁶

§ 468. **Magnitude — (Plaintiff's Fault).** — We have seen that negligence, to be actionable, must have attained a standard degree, varying with the circumstances;⁷ while contributory negligence needs simply to be of a degree enhancing the proximate cause of the injury.⁸ Both from this statement and from the principle that the law does not concern itself about trifles,⁹ as well as from the fact that our jurisprudence always takes to itself practical forms, it results that there

¹ *Washington v. Baltimore, &c. Rld.* 17 W. Va. 190; *Baldwin v. St. Louis, &c. Ry.* 63 Iowa, 210; *Goltz v. Winona, &c. Rld.* 22 Minn. 55; *Klipper v. Coffey*, 44 Md. 117.

² *Clay v. Wood*, 5 Esp. 44; *Spofford v. Harlow*, 3 Allen, 176; post, § 1016.

³ *Tuff v. Warman*, 5 C. B. N. s. 573, 5 Jur. N. s. 222; *New Jersey Exp. Co. v. Nichols*, 4 Vroom, 434; *Woods v. Jones*, 34 La. An. 1086; *Colorado Cent. Rld. v. Holmes*, 5 Colo. 197; *Baltimore,*

&c. Rld. v. The State, 36 Md. 366; *Baltimore, &c. Rld. v. Kean*, 65 Md. 394; *Bevis v. Baltimore, &c. Rld.* 26 Mo. Ap. 19.

⁴ Ante, § 466.

⁵ Ante, § 460.

⁶ It was rejected in *Murphy v. Deane*, 101 Mass. 455.

⁷ Ante, § 438.

⁸ Ante, § 459, 462.

⁹ Ante, § 35, 36.

may be a contributory negligence too small for the law's regard.¹ Moreover, to be available as a defence, it must be something for which the plaintiff was in fault.² If he exercises such care as should be expected of persons of ordinary prudence and intelligence under the circumstances, the law will not regard a minuter negligence, and he will not be cut off from his redress.³

§ 469. **Court or Jury.** — Contributory negligence is, like negligence,⁴ ordinarily a question of fact for the jury.⁵ Yet, in proper circumstances, such as on a question of nonsuit or the like, it is matter of law, and the court passes upon it as it does upon negligence.⁶

§ 470. **Burden of Proof.** — Some of the courts cast the burden on the plaintiff to allege and affirmatively prove that the complained-of injury proceeded in no part from his own negligence contributing.⁷ Others hold such negligence to be

¹ *Pendleton Street Rld. v. Stallmann*, 22 Ohio State, 1, 20; *Dewire v. Bailey*, 131 Mass. 169, 171; *Pacific Rld. v. Houts*, 12 Kan. 328; *Whirley v. White-man*, 1 Head, 610.

² *Wyandotte v. White*, 13 Kan. 191, 195; *Fowler v. Baltimore, &c. Rld.* 18 W. Va. 579; *Loeser v. Humphrey*, 41 Ohio State, 378.

³ *Hughes v. Muscatine*, 44 Iowa, 672. And see *Union Pac. Ry. v. Rollins*, 5 Kan. 167.

⁴ Ante, § 442, 444.

⁵ *Philbrick v. Niles*, 25 Fed. Rep. 265; *Orange, &c. Horse Rld. v. Ward*, 18 Vroom, 560; *Leavitt v. Chicago, &c. Ry.* 64 Wis. 228; *Colorado Cent. Rld. v. Holmes*, 5 Colo. 197; *International, &c. Ry. v. Ormond*, 64 Texas, 485; *Hackett v. Middlesex Manuf. Co.* 101 Mass. 101; *Sonier v. Boston, &c. Rld.* 141 Mass. 10; *Mattey v. Whittier Machine Co.* 140 Mass. 337; *Cook v. Missouri Pac. Ry.* 19 Mo. Ap. 329; *Henry v. Sioux City, &c. Ry.* 66 Iowa, 52; *Watson v. Wabash, &c. Ry.* 66 Iowa, 164; *Pennsylvania Rld. v. Garvey*, 12 Out. Pa. 369; *Dufour v. Central Pac. Rld.* 67 Cal. 319; *Palmer v.*

Detroit, &c. Rld. 56 Mich. 1; *Williams v. Delaware, &c. Rld.* 39 Hun, 430; *Alabama Great So. Rld. v. Arnold*, 80 Ala. 600; *Kirk v. Atlanta, &c. Ry.* 97 N. C. 82; *Robison v. Gary*, 28 Ohio State, 241.

⁶ *Ludwig v. Pillsbury*, 35 Minn. 256; *Matthews v. Missouri Pac. Ry.* 26 Mo. Ap. 75; *Hoyt v. Hudson*, 41 Wis. 105; *McDermott v. Third Ave. Rld.* 44 Hun, 107; *Goodlett v. Louisville, &c. Rld.* 122 U. S. 391; *Crowley v. St. Louis, Iron Mount. &c. Ry.* 24 Mo. Ap. 119.

⁷ *Murphy v. Deane*, 101 Mass. 455, 466; *Bovee v. Danville*, 53 Vt. 183; *Owens v. Richmond, &c. Rld.* 83 N. C. 502; *Nelson v. Chicago, &c. Rld.* 38 Iowa, 564; *Sullivan v. Toledo, &c. Ry.* 58 Ind. 26; *Hale v. Smith*, 78 N. Y. 480, 483; *Hart v. Hudson River Bridge*, 84 N. Y. 56, 62; *Lake Shore, &c. Rld. v. Miller*, 25 Mich. 274, 282; *Vicksburg, &c. Rld. v. Wilkins*, 47 Missis. 404; *Murphy v. Chicago, &c. Rld.* 45 Iowa, 661; *Eberhart v. Reister*, 96 Ind. 478; *Gaynor v. Old Colony, &c. Ry.* 100 Mass. 208; *Cincinnati, &c. Rld. v. Butler*, 103 Ind. 31; *Benton v. Central Rld.* 42 Iowa, 192.

matter of defence, which must be set up and established by the defendant;¹ yet, if the plaintiff's evidence discloses it, the effect is the same as though shown by the defendant.² Not deeming it of consequence to ascertain on which side of this question are the greater number of courts, one cannot fail to call to mind that contributory negligence is as distinctly a wrong in the plaintiff as negligence is in the defendant, and that it is as much against the principles of the law to presume it on the one side as on the other;³ resulting, therefore, in the conclusion, that the defendant can no more avail himself of the one without proof than can the plaintiff of the other.

V. *Comparative Negligence.*

§ 471. In Illinois, — in place of the doctrine of contributory negligence, the courts hold a different one, called comparative negligence. Not to undertake a minute exposition of it, in general terms it is that within recognized limits the negligence of the parties may be compared;⁴ and if, for example, the plaintiff's was slight, though contributory, and the defendant's comparatively gross, the action may be maintained.⁵ But

¹ *Raymond v. Burlington, &c. Ry.* 65 Iowa, 152 (under circumstances differing from those in the Iowa cases cited in the last note); *Snyder v. Pittsburgh, &c. Ry.* 11 W. Va. 14; *St. Louis, &c. Ry. v. Weaver*, 35 Kan. 412; *Houston, &c. Ry. v. Cowser*, 57 Texas, 293; *Riley v. West Va. &c. Ry.* 27 W. Va. 145; *MacDougall v. Central Rld.* 63 Cal. 431; *Buesching v. St. Louis Gas-light Co.* 73 Mo. 219; *Crouch v. Charleston, &c. Ry.* 21 S. C. 495; *Lincoln v. Walker*, 18 Neb. 244, 247; *Sanderson v. Frazier*, 8 Colo. 79; *Texas, &c. Ry. v. Orr*, 46 Ark. 182; *Little Rock, &c. Ry. v. Atkins*, 46 Ark. 423; *Montgomery, &c. Ry. v. Chambers*, 79 Ala. 338; *Thorpe v. Missouri Pac. Ry.* 39 Mo. 650; *Holt v. Whatley*, 51 Ala. 569; *Mares v. Northern Pac. Rld.* 3 Dak. 336; *Hocum v. Weitherick*, 22 Minn. 152.

² *Pennsylvania Canal Co. v. Bentley*, 16 Smith, Pa. 30; *Cleveland, &c. Rld. v. Rowan*, 16 Smith, Pa. 393; *Hoth v. Peters*, 55 Wis. 405; *Hoyt v. Hudson*, 41 Wis. 105; *Chicago, &c. Ry. v. Coss*, 73 Ill. 394.

³ *Indianapolis, &c. Rld. v. Horst*, 93 U. S. 291; *Hoyt v. Hudson*, 41 Wis. 105.

⁴ *Chicago, &c. Rld. v. Dillon*, 17 Bradw. 355; *Chicago, &c. Rld. v. Dougherty*, 12 Bradw. 181; *Moody v. Peterson*, 11 Bradw. 180; *Quinn v. Illinois Cent. Rld.* 51 Ill. 495; *Chicago, &c. Ry. v. Sweeney*, 52 Ill. 325; *Chicago, &c. Rld. v. Murray*, 62 Ill. 326; *Chicago, &c. Rld. v. Payne*, 59 Ill. 534; *Chicago, &c. Rld. v. Dunn*, 61 Ill. 335.

⁵ *Chicago v. Stearns*, 105 Ill. 554; *Chicago, &c. Rld. v. Johnson*, 103 Ill. 512; *Lake Shore, &c. Ry. v. O'Conner*,

if the negligence was gross on both sides, or otherwise equal, or if the defendant's was not largely in excess of the plaintiff's,¹ or if the plaintiff's was contributory to a considerable degree, which the author cannot quite define,² the action fails.

§ 472. In other States,—for example, in Kansas³ and Iowa,⁴—this doctrine of comparative negligence does not prevail. Perhaps it may have had a modifying influence upon the common-law rules in one or two of the States wherein it is not further accepted.

§ 473. In Admiralty cases,—for example, in cases of collision governed by the maritime law as transmitted to us from England,—if there is fault on neither side each party bears his own loss; the accident pertaining to the inevitable, and the same rule prevailing as under the common law.⁵ But, if both are in fault, the loss, contrary to the common-law rule, is apportioned equally⁶ or otherwise equitably between them,—more particularly how, it is not proposed here to inquire.⁷ This rule extends to all maritime torts.⁸

115 Ill. 254; Calumet Iron, &c. Co. v. Martin, 115 Ill. 358; Rockford, &c. Rld. v. Delaney, 82 Ill. 198; Schmidt v. Chicago, &c. Ry. 83 Ill. 405; Quinn v. Donovan, 85 Ill. 194; Illinois Cent. Rld. v. Hammer, 85 Ill. 526; Grayville v. Whitaker, 85 Ill. 439; Wabash, &c. Ry. v. Wallace, 110 Ill. 114; Toledo, &c. Ry. v. O'Connor, 77 Ill. 391; Chicago, &c. Rld. v. O'Connor, 13 Bradw. 62; Wabash, &c. Ry. v. Moran, 13 Bradw. 72; Union Stockyards, &c. Co. v. Monaghan, 13 Bradw. 148; Chicago, &c. Rld. v. Gregory, 58 Ill. 272; Pittsburgh, &c. Ry. v. Shannon, 11 Bradw. 222; Peoria, &c. Ry. v. Miller, 11 Bradw. 375; Chicago, &c. Ry. v. Harris, 54 Ill. 528; Chicago, &c. Rld. v. Pondrom, 51 Ill. 333; Chicago, &c. Ry. v. Coss, 73 Ill. 394.

¹ Illinois Cent. Rld. v. Baches, 55 Ill. 379; Sangamon Distilling Co. v. Young, 77 Ill. 197.

² Garfield Manuf. Co. v. McLean, 18 Bradw. 447; Toledo, &c. Ry. v. Pindar, 53 Ill. 447; Western Union Tel. v. Quinn, 56 Ill. 319; Chicago, &c. Rld. v. Robinson, 8 Bradw. 140; Chicago, &c. Ry. v. Murphy, 17 Bradw. 444; Chicago, &c. Ry. v. Donahue, 75 Ill. 106.

³ Atchison, &c. Rld. v. Morgan, 31 Kan. 77.

⁴ Johnson v. Tillson, 36 Iowa, 89.

⁵ Stainback v. Rae, 14 How. U. S. 532; The Marpesia, Law Rep. 4 P. C. 212.

⁶ "By the rule of the admiralty court, where there has been such contributory negligence, or in other words when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties." Miller, J. in Atlee v. Packet Co. 21 Wal. 389, 395.

⁷ Stoomvaart Maatschappij Nederland v. Peninsula, &c. Steam Nav. Co. 7

⁸ Atlee v. Packet Co. supra; The Max Morris, 28 Fed. Rep. 881; The Modoc, 26 Fed. Rep. 718.

VI. *Other Impediments to recovering Damages for Injuries from Negligence.*

§ 474. **Already.** — In a preceding chapter¹ we saw, in a general way, what will bar one's action for a non-contract wrong. Our sub-title on contributory negligence was little else than a special application of doctrines laid down in that chapter. And it will be the same with the present sub-title.

§ 475. **Intentional.** — Negligence is not a purposed infliction of injury, it is the mere careless doing of unmeant harm.² So that, for example, contributory negligence is no defence to an action for an intentional tort.³ Nor, on the other hand, is contributory negligence premeditated wrong. Yet a wrong which the plaintiff intends will always go as far to bar his recovery as contributory negligence, and it may go further. We saw, in a previous chapter, something of the effect of a plaintiff's trespass upon his action for the defendant's negligence.⁴

§ 476. **Consent,**⁵ — by the defendant, to the plaintiff's doing what would otherwise be contributory negligence takes away its effect as such. Thus, where one by permission of a railroad piled by its track some wood which it was to buy when measured, then a locomotive carelessly set it on fire, the plea of contributory negligence was held to be unavailing in his suit against the road.⁶ So, on the other hand, one who authorizes a thing to be done cannot have damages for the doing.⁷

Ap. Cas. 795 ; *The Manitoba*, 122 U. S. 97 ; *McCord v. The Tiber*, 6 Bis. 409 ; *The Sam Gaty*, 5 Bis. 190 ; *The Michael Davitt*, 28 Fed. Rep. 886 ; *The Columbia*, 27 Fed. Rep. 704 ; *The Washington*, 9 Wal. 513 ; *The Alabama*, 92 U. S. 695 ; *The Juniata*, 93 U. S. 337 ; *The Atlas*, 93 U. S. 302 ; *The Virginia Ehrman*, 97 U. S. 309 ; *The City of Hartford*, 97 U. S. 323 ; *The Sterling*, 106 U. S. 647.

¹ Ante, § 20-79.

² *Chicago, &c. Rld. v. Johnson*, 103 Ill. 512, 522 ; *Gardner v. Heardt*, 3

Denio, 232, 236, 237 ; *Tonawanda Rld. v. Munger*, 5 *Denio*, 255, 267.

³ *Ruter v. Foy*, 46 Iowa, 132 ; *Matthews v. Warner*, 29 Grat. 570 ; *Claxton v. Lexington, &c. Rld.* 13 Bush, 636 ; *Tonawanda Rld. v. Munger*, supra ; *Chicago, &c. Rld. v. Johnson*, supra.

⁴ Ante, § 60.

⁵ Ante, § 49-53.

⁶ *Pittsburgh, &c. Rld. v. Noel*, 77 Ind. 110. And see *Pennsylvania Co. v. Gallentine*, 77 Ind. 322.

⁷ *Spear v. Marquette, &c. Rld.* 49 Mich. 246.

§ 477. **Further on**, — in various connections, we shall have occasion to look into this subject more minutely. It is mentioned here to prevent misapprehensions by the reader.

VII. *In Particular Cases.*

§ 478. **Universal**. — The doctrine of negligence and contributory negligence extends through the entire law of non-contract rights and wrongs, though there is more of it under some heads than others.

§ 479. **In other Connections**, — as already stated,¹ the subject as to particular topics within the scope of the volume is explained. A few specimen illustrations, not likely to be looked for under the other titles, are —

§ 480. **Forgery**. — It is a species of negligence, though in some circumstances only slight, for one to pass as good the forged instrument of another with whom he has transactions.² Therefore if a company makes a transfer of its stock under a forged letter of attorney, it, and not the purchaser without fault, must bear the loss.³

§ 481. **Protest**. — On a question of some conflict in opinion, it appears to be the just doctrine that, if an indorsed note is left with a bank for collection, and is not paid by the maker, the bank discharges its duty as to demand and notice, to charge the indorser, by putting it into the hands of a reputable notary; it is not liable for the notary's neglect.⁴

§ 482. **Transmitting Money**. — The United States mail is not in law regarded safer for the transmission of money than a private carrier or banker. Whether or not in a particular instance it is, depends on the amount, the proportional expense, time required, distance, usage, and the like; so the question becomes one for the jury.⁵

§ 483. **Manufacture or Building**. — Under the title Nuisance, which embraces more or less of what may be equally well

¹ Ante, § 433.

² Bishop Con. § 676, 700.

³ Ashby v. Blackwell, 2 Eden, 299.
And see in this connection, Rouvant v.
San Antonio Nat. Bank, 63 Texas, 610.

⁴ Britton v. Nicolls, 104 U. S. 757;

Bank v. Butler, 41 Ohio State, 519.

For a partly analogous case, see Weyerhauser v. Dun, 100 N. Y. 150.

⁵ Buell v. Chapin, 99 Mass. 594.

regarded as negligence, we saw that if one sends into the community a dangerous thing, another casually injured by it may recover of him the damages.¹ And this doctrine applies to any manufactured article, and to a building which one so carelessly and improperly erects that it falls, injuring third persons. They may have their suit against him.² Within which principle, where one who had undertaken to build for another an elevator and it did not work well, sent his man to attend to it, a third person who in carrying out a direction from this man was injured by a defect in the elevator, was held entitled to his damages from the builder.³

§ 484. *The Doctrine of this Chapter restated.*

In the multitudinous activities of life, wherein of necessity men and their doings, property, and other interests come into contact, one who is duly careful avoids liability to another casually injured. The other's loss is a tax which he pays for the privilege of living in society. But where men carry on their activities negligently, the result is not always so. If two are negligent together, and from their joint negligence an injury comes to one of them, he whose contributory negligence has thus combined with the other's negligence must bear the loss alone, the same as though the other had been careful; except in admiralty, where commonly the loss is equally divided. But if one is negligent and the other is not, the party thus wholly in fault must pay to the other his damages. Such is the general doctrine. So much of it as concerns contributory negligence has been qualified in Illinois, and perhaps in some degree in one or two of the other States. And there are various minor doctrines, which need not here be repeated. The subject of negligence occupies a large space in the law of non-contract rights and wrongs; it more or less pervades the whole, and to some degree manifests itself in the other departments of the law.

¹ Ante, § 413.

² *Godley v. Hagerty*, 8 Harris, Pa. 6 Out. Pa. 156.

387; *Erie City Iron Works v. Barber*,

³ *Necker v. Harvey*, 49 Mich. 517.

CHAPTER XXV.

UNNAMED WRONGS.

§ 485. **Others with Names.** — The foregoing twelve chapters, each devoted to a wrong to which the law has given a name, do not absolutely exhaust the list. Such torts as the violations of trademarks, copyrights, and patents might be added, but they are not within the limits proposed for this volume. And injuries to easements, to and by animals, and various others not quite unnamed will be treated of further on. Now, —

§ 486. **Wrongs not named.** — If a wrongful act whereby one injures another has received no name, the consequence does not follow that it will be without redress. Our unwritten law is a system of reason, it is composed of legal principles,¹ whereof the respective adjudications are but evidences; and, as for them, the law dwells, to quote the words of Lord Mansfield, in their “reason and spirit,” not in “the letter of particular precedents.”² But the name of a tort cannot even be the subject of a “precedent.” Therefore the fact that we can find in our books no name for a wrong is not to any degree evidence that it is not actionable.

§ 487. **The Rules** — whereby to determine whether or not a suit will lie for a given injury are interspersed with their illustrations throughout this entire volume, but largely they appear in its earlier chapters. The author would be happy could he here set down some one little rule, exact and easy, and safe for a child to handle, which, placed upon any piece in the infinite possible “crazy work” of future wrong, would precisely indicate whether, in shape and dimensions, it is

¹ Ante, § 84.

² Fisher v. Prince, 3 Bur. 1363, 1364.

within or without the actionable class. But this, which would put the great lawyer and his small boot-black on one intellectual level, is impossible. Comyns's rule for ascertaining whether or not the "action upon the case" will lie, is as near the *desideratum* as anything; namely, "In all cases where a man has a temporal loss or damage, by the wrong of another, he may have an action upon the case to be repaired in damages."¹ A somewhat broader rule, yet equally indefinite, would be, that, whenever a man has received from another an injury through the violation of any legal duty which the other owes him, the law will give him its redress.² Yet neither of these rules can be applied except under the light of the entire legal system, each has its special and technical limitations and minor shapes, and either will relegate the boy trying it to his duty of growing to be a man in the law. Instances illustrative of what may be deemed the actionable wrong without name are —

§ 488. **Suing without Authority.** — If one brings a suit against another in the name of a third person who has not authorized it, he is answerable to the other in damages, though he acts without malice, so that the wrong is not malicious prosecution. It is simply a thing done unauthorized by law, wherefrom the complaining person has suffered.³ But —

§ 489. **Instigating Suit.** — It was held that one is not liable to a third person for instigating another to sue him, unless the suit is without cause. And this is plainly correct, since it cannot be wrong in a man to urge another to stand upon his legal rights. Blackford, J. added: "The law is said to be, that, if one procures another to sue me *without cause*, an action lies not against him who sued without cause; but, for

¹ Com. Dig. Action upon the Case, A.

² Not greatly different from this is the expression of Fay, L. J. in *Harris v. Brisco*, 17 Q. B. D. 504, 511; namely, "When an unlawful act results in a particular wrong to a particular person, our law, generally speaking, gives to

such person a remedy by action against the wrong-doer."

³ *Bond v. Chapin*, 8 Met. 31; *Metcalf v. Alley*, 2 Ire. 38; *Foster v. Dow*, 29 Maine, 442; *Moulton v. Lowe*, 32 Maine, 466.

this falsity in procuring my vexation, an action well lies.”¹
So —

§ 490. **In Nature of Malicious Prosecution.** — There are other wrongs similar to malicious prosecution, which, coming short of it, are not called by that name. For example, it is actionable to take out and enforce an execution on a judgment which the party knows to have been paid.² And any other like abuse of judicial process, not amounting to malicious prosecution, is within this rule.³

§ 491. **Dishonoring Check.** — If a banker, having funds, wrongfully refuses to pay the depositor’s check, — “an act particularly calculated to be injurious to a person in trade,” — he may be sued in tort, though the wrong is believed to be without name. “The defendants,” said Taunton, J., “were guilty of a breach of duty, which duty the plaintiff at the time had a right to have performed.”⁴

§ 492. **Not Discharging Mortgage.** — One whose mortgage is on record is entitled, if he pays it, to have it discharged of record. And an equitable action will lie against another who refuses, to compel him.⁵ So, —

§ 493. **Enticing to Break Contract.** — Within the principle that it is an actionable seduction to entice away another’s servant under contract,⁶ it is actionable thus to procure any person to violate any contract validly subsisting between him and the party complaining.⁷

¹ *Grove v. Brandenburg*, 7 Blackf. 234, 235, referring to *Perren v. Bud*, 2 Cro. Eliz. 793; *Savil v. Roberts*, 1 Salk. 13. And see *Harris v. Brisco*, 17 Q. B. D. 504.

² *Brown v. Feeter*, 7 Wend. 301; *Swan v. Saddlemire*, 8 Wend. 676. But see *Baugh v. Killingworth*, 4 Mod. 13, 14.

³ *Tomlinson v. Warner*, 9 Ohio, 103; *Fortman v. Rottier*, 8 Ohio State, 548; *Wilson v. Outlaw*, Minor, 367; *Hudson v. Howlett*, 32 Ala. 478; *Barnett v. Reed*, 1 Smith, Pa. 190; *Savage v. Brewer*, 16 Pick. 453; *Parsons v. Harper*, 16 Grat. 64; *Mann v. Holbrook*, 20

Vt. 523; *Seay v. Greenwood*, 21 Ala. 491; *Johnson v. Reed*, 136 Mass. 421, 423; *Wicker v. Hotchkiss*, 62 Ill. 107, 110; *Wait v. Green*, 5 Parker C. C. 185.

⁴ *Marzetti v. Williams*, 1 B. & Ad. 415, 424, 425; *Rolin v. Steward*, 14 C. B. 595. See *McGuire v. Kiveland*, 56 Vt. 62; *Wittich v. Pensacola First Nat. Bank*, 20 Fla. 843.

⁵ *Beach v. Cooke*, 28 N. Y. 508.

⁶ *Ante*, § 370, 371.

⁷ *Jones v. Stanly*, 76 N. C. 355, 356. The cases to this proposition are not numerous, yet it is believed to be sound. See *Bishop Dir. & F.* § 303.

§ 494. *The Doctrine of this Chapter restated.*

Heads of subjects, divisions of them, names, little and great devices of authorship, clear and muddy arrangements, — these, and all other things of the like nature, whether approved or disapproved by any or all of us, are foreign to the law, whereof they constitute no part. One who has suffered a legal injury may, if no technical rule appears barring him, have his redress. And it is not of the slightest consequence whether or not the wrong has been provided with a name. The illustrations of unnamed wrongs, given in this chapter, are not only not exhaustive, but they are simply minute parts of a very great and hitherto not accurately defined mass.

BOOK IV.

PARTICULAR SORTS OF PERSONS AND COMBININGS.

CHAPTER XXVI.

THE ELEMENTS OF THE INTENT, INSANITY, AND DRUNKENNESS.

- § 495. Introduction.
 496-504. Intent in General.
 505-510. Insanity.
 511-515. Drunkenness.
 516. Doctrine of Chapter restated.

§ 495. **How Chapter divided.**—We shall consider, I. The Intent in General; II. Insanity; III. Drunkenness.

I. *The Intent in General.*

§ 496. **Varying with Subject**—(Crimes—Torts).—All acts proceed from the mind. And all receive more or less color from the intent which prompted them. We ordinarily contemplate the intent as good or evil; but, looking at it more minutely, we discover various degrees and forms of good on the one side, and of evil on the other. In the criminal law, the question of the intent is not the same as in any department of civil jurisprudence.¹ There the State is the plaintiff, it seeks no compensation for an injury, but its object is punishment and repression. And it would do no good, while it would be an act of oppression, bringing contempt on a government professing to be civilized, to impose pains upon

¹ Ante, § 16; 1 Bishop Crim. Law, § 204-429.

one who, misled by the light which God and man gave him, had, impelled by the purpose to discharge his legal duties, unfortunately done what under the real, unseen facts was a technical violation of law. Therefore, in criminal jurisprudence, nothing which is not the outflow of a criminal mind is a crime. On the other hand, the plaintiff in a suit for a civil wrong is a private person; and he seeks, not punishment, but compensation for his suffering or loss. To maintain his suit, the defendant must have done something, and the effect of the doing must have been an injury to him.¹ The doings of people, wherefrom injury comes to other people, are innumerable. The law, to make some of them actionable, requires one or another form of evil intent in the doer, according to the nature of the particular case. We have had many illustrations of this in the foregoing chapters. There are other forms of civil wrong wherein the intent, whether good or evil, is of no legal consequence; if any act of the defendant, whatever its moral quality, has resulted in the injury, he must make compensation. Hence,—

§ 497. **Doctrine defined.** — In the law of non-contract civil wrongs, there is no universal rule either requiring or not requiring a malicious or other evil intent in the doer, but each wrong must be considered with respect to its class; so that for some an action will lie irrespective of the motives which prompted them, while others to be actionable must have proceeded from one or another form of the evil mind, according to the particular case or class. Thus,—

§ 498. **Irresistible Compulsion.** — One who is impelled to a thing by a power which he cannot resist, is, on principles explained in a preceding chapter,² without liability to a person casually injured. To be within this exemption, it is not enough that he did not mean to inflict the particular or any harm, he must be utterly without fault.³ The law, in this class of cases, looks upon the act, not as done by the person ostensibly performing it, but by the superior power. Again,—

¹ Ante, § 22–39.

² Ante, § 155–185.

³ *Wakeman v. Robinson*, 1 Bing.

213, 8 Moore, 63; *Davis v. Saunders*,

2 Chit. 639; *Morgan v. Cox*, 22 Mo.

373.

§ 499. **Intent Immaterial.** — Assuming the case to be one in which the law regards the ostensible as the real doer, and not the sort of case just mentioned, if the complained-of injury is a trespass to property real or personal, it is no defence to the doer that he was without moral fault; as, for example, that he supposed the property to be his,¹ or another's whom he was assisting,² or otherwise committed the trespass inadvertently.³ Lack of evil motive may simply reduce the damages.⁴ Not perfectly,⁵ but to a degree not quite definable, this doctrine extends to trespass to the person; as, if an arresting officer through an honest mistake takes another than the one subject to his particular authority, — for instance, another than the one mentioned in his precept, — not being led thereto by any trick or falsehood of the other, he is liable.⁶

§ 500. **Purposed Injury.** — It has already been explained⁷ that one who intentionally injures another cannot avail himself of the various excuses through which the well-meaning or less evil-meaning inflicter of damage often escapes. But —

§ 501. **Modified Evil Intent.** — A very large proportion of the actionable wrongs proceed from negligence,⁸ which is neither an intent to commit the injury nor a mental condition free from fault. There are other mental states occupying a like middle ground. Thus, if two persons are fighting, and one of them unintentionally strikes a third, he is answerable to the third person, and his want of malice toward him will only mitigate the damages.⁹ The reason is simply that the injury came from an intentional, unlawful act; while a like injury from a well-meant lawful one would not be actionable if carefully performed, though if negligently it would be.¹⁰

¹ Ante, § 13, 14, 19, 101; *Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403.

² *Wallard v. Worthman*, 84 Ill. 446.

³ *Basely v. Clarkson*, 3 Lev. 37; *Covell v. Laming*, 1 Camp. 497; *Jordan v. Wyatt*, 4 Grat. 151. See and compare *Young v. Vaughan*, 1 Houst. 331; *Brooks v. Olmstead*, 5 Harris, Pa. 24; *Graves v. Severens*, 40 Vt. 636; *Keirn v. Warfield*, 60 Missis. 799.

⁴ *Hatch v. Pendergast*, 15 Md. 251.

⁵ Ante, § 195.

⁶ *Hays v. Creary*, 60 Texas, 445; *Shanley v. Wells*, 71 Ill. 78.

⁷ Ante, § 142-147.

⁸ Ante, § 433-484.

⁹ Ante, § 181; *James v. Campbell*, 5 Car. & P. 372.

¹⁰ Ante, § 178-181; *Vandenburgh v. Truax*, 4 Denio, 464; *Noyes v. Shepherd*, 30 Maine, 173; *Weaver v. Ward*, Hob. 134, Sir F. Moore, 864.

§ 502. **Knowledge**, — which is an element in the intent, is often essential to liability.¹ Thus, to charge a town or other corporation with damages from a defect in the highway, or from any other nuisance which it is under obligation to remove, its actual or constructive knowledge of the thing must be shown.² So a railway conductor is not liable for permitting a passenger to travel on the road with goods known by him to be stolen, where he does not know also that the passenger is the thief or the person afterward suing him is the owner.³ An agister of cattle turned them into a pasture with other cattle, and they contracted the Texas fever; he did not know of the danger, so he was held not responsible to the owner.⁴ One running a railway train has additional responsibility from knowing that there is on the track a person liable to be run over.⁵

§ 503. **Legal Right**. — One may stand on a legal right,⁶ — for example, expel another by lawful means from his counting-room,⁷ or enforce against another a legal demand,⁸ — however improper the motive impelling him.

§ 504. **These Illustrations** — simply show that, as our definition explains, there is no general doctrine of the intent in these non-contract civil wrongs. The question depends upon the particular wrong, or the class to which the case belongs.

II. *Insanity*.

§ 505. **General**. — Insanity, however viewed anciently, is in modern times deemed a visitation from God, — a disease or mal-construction of the mind. So long, therefore, as the law is a system of reason, and the accepted deductions of reason⁹

¹ *Murray v. Young*, 12 Bush, 337; *Ramsey v. Riley*, 13 Ohio, 157.

² *Foster v. Boston*, 127 Mass. 290; *Reed v. Northfield*, 13 Pick. 94; *Conhocton Stone Road v. Buffalo, &c. Rld.* 51 N. Y. 573; *Morse v. Fair Haven East*, 48 Conn. 220.

³ *Randlette v. Judkins*, 77 Maine, 438. 114.

⁴ *Gibbs v. Coykendall*, 39 Hun, 140. See *Bradford v. Floyd*, 80 Mo. 207.

⁵ *International, &c. Ry. v. Smith*, 62 Texas, 252.

⁶ *Ante*, § 103.

⁷ *Brothers v. Morris*, 49 Vt. 460.

⁸ *Macey v. Childress*, 2 Tenn. Ch.

⁹ *Ante*, § 88.

in one part of it are authority in any other part, the conclusion must remain that, since the act of God, whereof insanity is a particular form, excuses an ostensible evil doing,¹ this special form insanity, when sufficiently complete and profound, frees, as well from civil liability as from criminal, any injurious act whereof it is the cause. Still the utterances of judges and legal writers, especially those in the older books, not much modified by the later, are the direct reverse of this; namely, that insanity furnishes no excuse for a civil tort.² Looking below these mere *dicta*, we find the decisions to be partly so, not wholly. Thus, —

§ 506. **In Defamation.** — In reason, an insane person cannot have the malice essential in slander and libel.³ And this doctrine may be deemed to be sufficiently, though not very firmly, established in authority.⁴

§ 507. **Where Intent Immaterial.** — In those cases wherein the intent is immaterial,⁵ there is abundant authority for saying that insanity constitutes no defence. And sometimes the judges, to give effect to the broader *dictum* that insanity cannot be pleaded to an action of tort, add that it is because in tort the intent is not material.⁶ An illustration of this is a trespass by an insane person; it is uniformly held to be actionable.⁷ The reason whereof has been stated to be, because “no man shall be excused of a trespass except it may be judged utterly without his fault; as, if a man by force take my hand

¹ Ante, § 166, 167, 496.

² *Weaver v. Ward*, Hob. 134, “if a lunatic hurt a man, he shall be answerable in trespass;” Com. Dig. Action upon the Case for Negligence, B, 1; Bac. Abr. Idiots and Lunatics, E, Trespass, G; 1 Chit. Pl. 76, “although a lunatic is not punishable criminally, he is liable to a civil action for any tort he may commit;” *Ward v. Conatser*, 4 Baxter, 64; *Mordaunt v. Mordaunt*, Law Rep. 2 P. & D. 103, 142; *Taggard v. Innes*, 12 U. C. C. P. 77; *Krom v. Schoonmaker*, 3 Barb. 647, 650; *Morse v. Crawford*, 17 Vt. 499, 502; *Cross v. Kent*, 32 Md. 581; *Haycraft v. Creasy*, 2 East, 92, 104.

³ Ante, § 257, 261, 280, 306.

⁴ *Yeates v. Reed*, 4 Blackf. 463; *Bryant v. Jackson*, 6 Humph. 199; *Horner v. Marshall*, 5 Munf. 466; In *Dickinson v. Barber*, 9 Mass. 225, no opinion was expressed on this precise question; but it was deemed that, if the insanity was so profound as to render the words without effect, it would at least in this way be a defence. s. p. *Gates v. Meredith*, 7 Ind. 440.

⁵ Ante, § 499.

⁶ *Krom v. Schoonmaker*, 3 Barb. 647, 650.

⁷ *Morse v. Crawford*, 17 Vt. 499, 502; *Behrens v. McKenzie*, 23 Iowa, 333, 343; *Weaver v. Ward*, Hob. 134,

and strike you.”¹ Now, this explanation relegates the case, not to the doctrine of immaterial intent,² but to that of irresistible compulsion,³ wherein the act of God, of which insanity is an instance, excuses. So that on this question particular cases and legal doctrine are in flat conflict. Still, —

§ 508. **Further, in Principle.** — As well in principle as in authority, there are distinctions between insanity in civil jurisprudence and in criminal. In the law of contracts, for example, an insane person is often and properly holden to the civil suit where he would not be responsible for a crime. This occurs when some benefit has been conferred upon him, such as where he has received necessary sustenance; and, though he lacks the capacity to promise remuneration, the law promises for him.⁴ Undoubtedly, on just principle, something analogous to this pervades the law of non-contract civil rights and wrongs. Thus, —

§ 509. **Lunatic Innkeeper.** — In an old action against an innkeeper for not keeping the goods of his guest safely, the innkeeper set up the defence that he was insane, but the decision was against him. “For the defendant, if he will keep an inn, ought at his peril to keep safely his guest’s goods; and, although he be sick, his servants then ought carefully to look to them. And to say he is of non-sane memory, it lieth not in him to disable himself, no more than in debt upon an obligation.”⁵

§ 510. **Restraining Insane Person.** — “God forbid that a man should be punished for restraining the fury of a lunatic.”⁶ This right of restraint is universal, and is exercised both with and without statutory authorization.⁷

Sir F. Moore, 864; Cross v. Kent, 32 Md. 581.

¹ Weaver v. Ward, supra.

² Ante, § 499.

³ Ante, § 498.

⁴ Bishop Con. § 955-978.

⁵ Cross v. Andrews, 2 Cro. Eliz. 622.

⁶ Lord Mansfield in Brookshaw v. Hopkins, Lofft, 240, 243.

⁷ King v. Ohio, &c. Ry. 22 Fed. Rep. 413; International, &c. Ry. v. Leak, 64 Texas, 654; Royston’s Appeal, 53 Wis. 612; Atchison, &c. Rld. v. Weber, 33 Kan. 543; Look v. Dean, 108 Mass. 116.

III. *Drunkenness.*

§ 511. **General.** — In the criminal law, wilful drunkenness is deemed so far wrongful that it supplies the place of a general criminal intent; therefore, as general doctrine, it is no excuse for crime. But it renders impossible the commission of any particular crime which, for its constitution, requires a special form of the criminal intent, if so deep as to incapacitate the mind for such specific intent.¹ In the modern law of contracts, contrary to the old doctrine, it makes void a contracting done while it has drowned the “agreeing mind.”² It is a specific, not a mere general, state of the mind which creates a contract; so that the criminal law and the law of contracts do not differ in respect of drunkenness. And, in principle, the same rule would seem to apply to torts; namely, that being drunk is not a general defence, but it may be available where the tort is of a particular sort requiring a special intent. The authorities seem not to have done much for or against this proposition. To resort to such as we have, —

§ 512. **In Slander.** — Drunkenness has been adjudged to be no mitigation in an action for slander.³

§ 513. **Contributory Negligence** — is the product of a general ill-condition of the mind, not of a specific intent. Therefore, on principle, drunkenness does not excuse it; and so also are the authorities.⁴ Indeed, drunkenness tends to show contributory negligence.⁵ On the other hand, the fact that one is drunk or a drunkard does not justify another in even negligently injuring him;⁶ and, if known to the

¹ 1 Bishop Crim. Law, § 397-416.

² Bishop Con. § 980.

³ *Mix v. McCoy*, 22 Mo. Ap. 488.

⁴ *Alger v. Lowell*, 3 Allen, 402; *Welty v. Indianapolis*, &c. Rld. 105 Ind. 55; *Hubbard v. Mason City*, 60 Iowa, 400; *O'Hagan v. Dillon*, 42 N. Y. Super. 456; *Illinois Cent. Rld. v. Cragin*, 71 Ill. 177; *Cramer v. Burlington*, 42 Iowa, 315; *Smith v. New*

York Cent. &c. Rld. 38 Hun, 33; *Little Rock, &c. Ry. v. Pankhurst*, 36 Ark. 371; *Illinois Cent. Rld. v. Hutchinson*, 47 Ill. 408; *Monk v. New Utrecht*, 104 N. Y. 552; *East Tennessee, &c. Rld. v. Winters*, 85 Tenn. 240.

⁵ *Illinois Cent. Rld. v. Cragin*, 71 Ill. 177.

⁶ *Baltimore, &c. Rld. v. Boteler*, 38 Md. 568; *Milliman v. New York, &c.*

other,¹ it may call for special care arising from the particular danger.² Intoxication, therefore, may be matter for the consideration of the jury.³

§ 514. *As Negligence.* — An employee's drunkenness or habitual intemperance, if known to the employer, will in proper circumstances be treated as negligence in the latter.⁴

§ 515. *Trespass.* — Whatever may be the doctrine as to insanity where the insane person is utterly without fault,⁵ voluntary drunkenness is never looked upon by the law as pure white, therefore evidently it does not excuse a trespass.⁶ One sued for driving into the carriage of a licensed liquor-seller claimed in defence that the plaintiff sold him intoxicants which incapacitated him for driving properly, but the defence was adjudged not available.⁷

§ 516. *The Doctrine of this Chapter restated.*

There is no one state of the mind which the law has made a common element in actionable non-contract wrongs. However important the mental condition may be, it is a question pertaining simply to the particular tort or class. To this proposition there is the single exception, that the act of God, or whatever else is unavoidable, will in all these cases excuse an injurious doing. But unfortunately we have adjudications which seem to make one exception to this exception; namely, that, when the act of God takes the form of insanity, the afflicted individual becomes answerable for it to another casually injured. This exception to the exception

Rld. 6 Thomp. & C. 585, 4 Hun, 409; Houston, &c. Ry. v. Reason, 61 Texas, 613; Toledo, &c. Ry. v. Riley, 47 Ill. 514.

¹ Ante, § 466.

² Werner v. Citizens Ry. 81 Mo. 368; Kean v. Baltimore, &c. Rld. 61 Md. 154; Yarnall v. St. Louis, &c. Ry. 75 Mo. 575; Louisville, &c. Rld. v. Sullivan, 81 Ky. 624; Gill v. Rochester, &c. Rld. 37 Hun, 107; Seymer v. Lake, 66 Wis. 651.

³ Fitzgerald v. Weston, 52 Wis. 354;

Ditchett v. Spuyten Duyvil, &c. Rld. 5 Hun, 165.

⁴ Chicago, &c. Rld. v. Sullivan, 63 Ill. 293; Cleghorn v. New York Cent. &c. Rld. 56 N. Y. 44.

⁵ Ante, § 505.

⁶ Sullivan v. Murphy, 2 Miles, 298; Barbee v. Reese, 60 Missis. 906.

⁷ Cassady v. Magher, 85 Ind. 228. Compare with Engleken v. Hilger, 43 Iowa, 563; Kearney v. Fitzgerald, 43 Iowa, 580.

lies too near the old doctrine of the common law, enforced by Sir Matthew Hale and other admirable judges, that for a woman to be made by superior powers a witch justifies putting her to death, to be fully in accord with the civilization of the present day. So there is here an opportunity to invite the fresh attention of the courts to this question. Drunkenness, however overpowering, is not the act of God, but the very weak act of the man himself, for which he is responsible. So it has not the same excusing effect which in just principle should be given to insanity.

CHAPTER XXVII.

THE COMBININGS OF PERSONS AND FORCES.

§ 517. **Already**, — in preceding chapters, we have seen something of the principles which govern here.¹ We shall not attempt to avoid repetition while calling them to mind with special reference to the purposes of this chapter.

§ 518. **The Fundamental Doctrine** — is, that, since the habitations and life of man are in the midst of constantly active forces in nature, and his necessities compel him to be perpetually active also, it is not possible in jurisprudence nor would it be just to limit one's responsibility for harm inflicted on another through his acts, to the particular injuries whereof those acts are the sole cause. Indeed, a sole cause is a thing seldom found in our complicated world. Nor would it be practicable, nor yet is it demanded by any principle of justice, to take into the account all the combining causes of an injury, and charge the author of each cause with simply his proportion of the damage. Therefore the rule of the law is, that a person contributing to a tort, whether his fellow-contributors are men, natural or other forces, or things, is responsible for the whole, the same as though he had done all without help.² The limit to this rule, in civil jurisprudence, is simply what is required by another rule; namely, that, —

¹ Ante, § 39-45, 450-453.

² Ante, § 39, 450; Louisville, &c. Rld. v. Case, 9 Bush, 728; Barrett v. Third Ave. Rld. 45 N. Y. 628, 631; Tompkins v. Clay St. Rld. 66 Cal. 163; Nagel v. Missouri Pac. Ry. 75 Mo. 653; Minneapolis Mill Co. v. Wheeler, 31 Minn. 121; Fairbanks v. Kerr, 20 Smith, Pa. 86; Calder v. Smalley, 66

Iowa, 219; Attorney-General v. Wilson, Craig & P. 1; Murphy v. Wilson, 44 Mo. 313; Hill v. Goodchild, 5 Bur. 2790; Brown v. Allen, 4 Esp. 158; Mitchell v. Milbank, 6 T. R. 199; O'Shea v. Kirker, 4 Bosw. 120; Bulkley v. Smith, 1 Duer, 704; Gates v. Fleischer, 67 Wis. 504.

§ 519. **One Compensation — (Right in Plaintiff).** — Both in natural justice and in law, a person who has suffered an injury is entitled to receive his damages but once.¹ For the principle is universal that one can enforce from another payment or other redress only to the extent to which his right and the other's wrong combine;² in other words, every plaintiff must stand equally on his own right and the defendant's wrong.³ There is as to this a broad distinction between civil jurisprudence and criminal. If in a joint civil trespass five hundred men carry away and ruin another's hat worth two dollars, it would be a manifest overdoing of justice to compel each to pay two dollars to the owner, who would thus receive one thousand dollars for his hat. But if the five hundred jointly stole the hat, and the State indicted them for the crime, the fine of two dollars imposed upon each, and the compelling of every one of them to pay it as though he were the sole thief, would be a very mild administration of justice; for the State is as much offended against, and it should and does make the punishment of each individual as severe, when five hundred combine in a crime as when one commits it alone.⁴ Still, —

§ 520. **Sufferer and Doer, compared.** — The wrong-doer has in himself no higher claim to be let off lightly in civil jurisprudence than in criminal. The distinction is derived solely from the limitation of the plaintiff's right, not in any degree from merit in the defendant. So that it would be no injustice to any one of the five hundred, in the civil case just supposed, to compel him to pay alone the full value of the hat; and, in law, this sort of thing is often required. Thus, —

§ 521. **Sue All, or Part.** — One who has suffered from the joint tort of several persons may bring his suit against all of

¹ *Livingston v. Bishop*, 1 Johns. Dufresne v. Hutchinson, 3 Taunt. 117; 290; *Metz v. Soule*, 40 Iowa, 236; *Westbrook v. Mize*, 35 Kan. 299.

Brown v. Kencheloe, 3 Coldw. 192; ² *Ante*, § 22-34.

Hammatt v. Wyman, 9 Mass. 138, 142; ³ *Rex v. Worcester*, Vaugh. 53, 60; *Drake v. Mitchell*, 3 East, 251, 258; *Tracy v. Norwich, &c.* Rld. 39 Conn. 382; *Foster v. Evans*, 51 Mo. 39; *Richardson v. Pulver*, 63 Barb. 67; *Wright v. Defrees*, 8 Ind. 298.

Cocke v. Jennor, Hob. 66; *Bird v. Randall*, 3 Bur. 1345; *Murray v. Lovejoy*, 2 Clif. 191; *Snow v. Chandler*, 10 N. H. 92; *Pogel v. Meilke*, 60 Wis. 248; ⁴ 1 Bishop Crim. Law, § 957 and note.

them collectively, or against any one or number less than all, at his election; while, as just said, he can put into his pocket the damages but once. Whether or not he can proceed against all so far as to take out several executions is a question of practice, not within the scope of this volume.¹ There may be an exception to this rule in a particular case, growing out of its special nature; as, where the tort is founded on a joint contract,² or the like,³ the joinder of all as defendants may be required. Descending now more into the particulars, —

§ 522. **Persons Combining** — (The Rule). — All who contribute to a tort, even by their wills alone, especially, therefore, all who contribute by their acts, even though in an inferior degree, are, whether they are personally present or absent at the doing, liable to the person injured, each for the entire damage,⁴ and it cannot be apportioned;⁵ the

¹ Cases cited to § 519; Heydon's Case, 11 Co. 5 a; Blann v. Crocheron, 19 Ala. 647; Davis v. Taylor, 41 Ill. 405; Stone v. Matherly, 3 T. B. Monr. 136; North Penn. Rld. v. Mahoney, 7 Smith, Pa. 187; McGee v. Overby, 7 Eng. 164; Jarvis v. Blennerhasset, 18 Wend. 627; Klauder v. McGrath, 11 Casey, Pa. 128; Milford v. Holbrook, 9 Allen, 17; Graham v. Houston, 4 Dev. 232; The Bernina, 12 P. D. 58, 83, 90; Creed v. Hartmann, 29 N. Y. 591; Sutton v. Clarke, 6 Taunt. 29; Wright v. Lathrop, 2 Ohio, 33; Knickerbocker v. Colver, 8 Cow. 111; Elliott v. Hayden, 104 Mass. 180; Brinsmead v. Harrison, Law Rep. 6 C. P. 584, 7 C. P. 547; Fleming v. McDonald, 50 Ind. 278.

² Weall v. King, 12 East, 452.

³ Low v. Mumford, 14 Johns. 426.

⁴ Berry v. Fletcher, 1 Dil. 67; Bell v. Miller, 5 Ohio, 250; Clark v. Bales, 15 Ark. 452; Brooks v. Ashburn, 9 Ga. 297; Woodbridge v. Conner, 49 Maine, 353; Menham v. Edmonson, 1 B. & P. 369, 371; Gudger v. Western North Car. Rld. 21 Fed. Rep. 81; Olsen v. Upsahl, 69 Ill. 273; Wallard v. Worth-

man, 84 Ill. 446; Brown v. Perkins, 1 Allen, 89; Shepherd v. McQuilkin, 2 W. Va. 90; Lewis v. Johns, 34 Cal. 629; McMannus v. Lee, 43 Mo. 206; Elder v. Frevert, 18 Nev. 446; Barker v. Braham, 2 W. Bl. 866, 868; Brown v. Lent, 20 Vt. 529; Whitney v. Turner, 1 Scam. 253; Whitaker v. English, 1 Bay, 15; Chanet v. Parker, 1 Mill, 333; Bath v. Metcalf, 145 Mass. 274; Freeman v. Scurlock, 27 Ala. 407; Garth v. Howard, 8 Bing. 451; Sikes v. Johnson, 16 Mass. 389; Bird v. Lynn, 10 B. Monr. 422.

⁵ Hill v. Goodchild, 5 Bur. 2790; Keegan v. Hayden, 14 R. I. 175; Beal v. Finch, 1 Kernan, 128; Fuller v. Chamberlain, 11 Met. 503. This is not the admiralty rule in a case of collision; as, if a vessel and her tow, both being in fault, collide with another not in fault, each of the former two must pay half the damages. Still, "if," in the words of Clifford, J. "either of the faulty parties is unable to pay the whole of his moiety, it is, in general, the right of the injured party to collect the balance of the other faulty party." The Virginia Ehrman, 97 U. S. 309, 317.

same as, if the wrong were a crime of the grade of misdemeanor, all would be answerable as principal doers.¹ For example,—

§ 523. **Present and Encouraging.**—All who are present while others are committing a tort, and encouraging them, though not otherwise taking part therein, are in the same manner and degree answerable to the person injured as though they did it with their own hands.² But a mere passive presence, without any proven participation of the will, or any act encouraging or discouraging the doing, will not bring the case within this rule;³ while yet, from the circumstances, joined with presence without dissent, a participation may be inferred by the jury.⁴ It may be inferred, for example, where one present grossly neglects to rescue a feeble old man from persons who are mercilessly beating him.⁵ And it is a clear participation for one, with the intent to get up a fight, to go with others to the place, if the latter there carry the purpose into execution.⁶ After the wrong has been done, the mere subsequent approval of it will not create liability.⁷ So,—

§ 524. **Not Present.**—In the same manner, one may be liable though not present. A familiar instance is where a master is holden for a wrong done by his servant in his absence.⁸ And it is common doctrine that the procurer of a thing which another executes elsewhere than at the place of procurement is chargeable as doer.⁹ Or, there may be a mixture of presence and absence;¹⁰ as, in trespass to goods, if two persons engage therein, and one carries away a package while

¹ 1 Bishop Crim. Law, § 628 et seq., 685, 686; *Whitney v. Turner*, 1 Scam. 253.

² *Brown v. Perkins*, 1 Allen, 89, 98; *Little v. Tingle*, 26 Ind. 168; *Frantz v. Lenhart*, 6 Smith, Pa. 365; *United States v. Ricketts*, 1 Cranch C. C. 164; *Cooper v. Johnson*, 81 Mo. 483.

³ *Miller v. Shaw*, 4 Allen, 500; *Berry v. Fletcher*, 1 Dil. 67.

⁴ *Brown v. Perkins*, 1 Allen, 89.

⁵ *Gillon v. Wilson*, 3 T. B. Monr. 217.

⁶ *Rhinehart v. Whitehead*, 64 Wis. 42.

⁷ *Grund v. Van Vleck*, 69 Ill. 478; *Cooper v. Johnson*, supra.

⁸ Post, § 610.

⁹ 1 Bishop Crim. Law, § 685, 686; *Baxter v. Warner*, 6 Hun, 585; *Jennings v. Van Schaick*, 13 Daly, 438; *Fow v. Roberts*, 12 Out. Pa. 489; *Jarvis v. Baxter*, 52 N. Y. Super. 109.

¹⁰ *Stansbury v. Fogle*, 37 Md. 369; *Clark v. Newsam*, 1 Exch. 131.

the other is putting up another, which both take off together, they are jointly answerable for the whole.¹

§ 525. **Sort of Wrong — (Oral Slander — Combined Shooting — Whipping).** — We thus see that, to charge one with a tort by reason simply of his having participated therein, it is immaterial whether he was present or absent at the doing, and whether it was his will alone, or his act, that entered with the acts of others into the completed wrong. The consequence whereof is that the doctrine is universal, and that there is no tort of a sort to be committed by a union of intent and act, to which it does not in full apply. For example, if the tort consists of putting a physical thing in motion, as where a person beats another with a whip, one will be a joint doer if he instigated it, though he is miles away when the whipping is given.² Moreover, since the concurrence of the will without any act suffices, one may be chargeable by reason of such concurrence though, in addition to the fact of his not personally doing the act, it is of a sort which he could not personally perform. We have an illustration of this in the criminal law, which in this particular is identical with the law of civil torts. A husband has no legal capacity to commit a rape on his wife, and a woman has no physical capacity; yet, if the husband and the woman are present encouraging a man of legal and physical capacity in the commission of it, both may be indicted with him as principal offenders.³ There are in the reports some inconsiderate *dicta*, evidently not law, contrary to this. We cannot better state them than in the words of an excellent contemporary work on Torts. "Some wrongs," it is there said, "are in their nature necessarily individual, because it is impossible that two or more should together commit them. The case of the oral utterance of defamatory words is an instance; this is an individual act, because there can be no joint utterance. He alone can be liable who spoke the words; and, if two or more utter the same slander at the same time, still the utterance of each is

¹ Harris v. Rosenberg, 43 Conn. 227.

² 2 Bishop Crim. Law, § 1116, 1135;

³ Sikes v. Johnson, 16 Mass. 389; Bishop Dir. & F. § 914.

Avery v. Bulkly, 1 Root, 275.

individual, and must be the subject of a separate proceeding for redress.”¹ Now, among the most common proceedings in our courts are trials for murder wherein, several persons combining to harm another, one shoots him with a firearm, and all are tried and convicted together. But the pulling of the trigger is the work of one alone. It would indeed be theoretically possible for all to pull it together, just as all might pronounce together words of slander; but the cases in contemplation are those wherein, in fact, one alone did it. And, precisely following this common course in criminal jurisprudence, it has with unquestionable correctness been adjudged in the law of torts that, if several persons meet, and by a mutual understanding arrange themselves on opposite sides, and enter into a combat with pistols, then, should a passer-by be wounded by a shot from any one of the pistols, all will be jointly and severally liable to him in a civil action for the damage. And it will be immaterial whether a defendant in the action, or any one else of the party, fired the shot.² The doctrine of the law is, as already explained, that an actionable tort consists of the two elements of will and perform-

¹ Cooley Torts, 124, referring to *Chamberlain v. White*, Cro. Jac. 647; *Swithin v. Vincent*, 2 Wils. 227; *Chamberlaine v. Willmore*, Palm. 313; *Patten v. Gurney*, 17 Mass. 182; *The State v. Roulstone*, 3 Sneed, 107; *Webb v. Cecil*, 9 B. Monr. 198. We have in the criminal law books more or less of the like sort. For example, 2 Bishop Crim. Proc. § 61, 811. And see, as expressing the correct doctrine, 2 Bishop Crim. Law, § 948. I do not propose to inquire how far the authorities cited by Cooley sustain his text; I have no doubt they were carefully considered by him; certainly his language accords with what is found in some other books, and for the present purpose I accept it as proof of what has the semblance of a doctrine of the law. And still it is so directly antagonistic to what is firmly settled, both in reason and in authority, that it cannot be law, that it is not law, and that it is the first duty of the

courts to overturn every case which seems to sustain it. Let us suppose that a band of over-ardent politicians, understanding that a newly elected President was considering whether or not to take into his cabinet a person obnoxious to them, should meet and concoct a slanderous falsehood of this person, with the view of preventing his appointment. Having adjusted the details of what they know to be a lie, and appointed one of their number as spokesman, they march together into the presence of the President, the one utters the slander, the others bow their approbation, and together the conspirators retire. Obviously, upon the face of this case, it is the ordinary one of joint tort-feasors, and to hold otherwise would be to overthrow the whole law of the subject. See, as illustrative, *Parkes v. Prescott*, Law Rep. 4 Ex. 169.

² *Murphy v. Wilson*, 44 Mo. 313.

ance; and he who palpably contributes to either element, though his contribution consists of but a small part of it,¹ is responsible for the whole. If one has will, and he mingles it with the wrong-doing of another, or force, and he puts it into the compound, it is quite immaterial that he could not or did not do more. This broader and firmer doctrine, by its nature and by its terms, includes the just-stated case of oral slander, and it is impossible that it and the contrary doctrine in slander should stand together. Judges, whether on or off a bench, cannot establish contradictions. Many assert that the Almighty cannot, but our present argument does not require us to look higher than a bench of common-law judges.

§ 526. *Neglects.*—Commonly, where the law has cast a duty upon one to another, a simple neglect to discharge it, whereby the other has suffered an injury, is actionable.² For example, it is so in the case of one who is erecting a building on a street; he must employ safeguards against accidents to persons coming in lawful contact with his operations, and if he does not he is answerable for the damages to an individual injured.³ Thereupon, if two persons stand side by side, or if they are engaged in some common enterprise, and a duty rests on one but not on the other, the former only is liable to a third person who suffers from the duty not being done.⁴ And still, if both owe the duty, the two are in like circumstances jointly as well as severally responsible.⁵ Now, if the duty rests only on one, can the other by any joining of will with his become answerable for his neglecting it? This would seem to be a question rather of mental philosophy than of law. As, in such a case, neither party did anything, there was no contribution by act. The mere concurring presence,

¹ Ante, § 39, 522; *Slater v. Merse-
reau*, 64 N. Y. 138; *Union Ry. & Co.
v. Shacklet*, 119 Ill. 232.

² Ante, § 132, 135-137, 139, 140;
Gully v. Smith, 12 Q. B. D. 121.

³ *Samyn v. McClosky*, 2 Ohio State,
536. Of the like sort, *Whirley v.
Whiteman*, 1 Head, 610; *Scott v.
Hunter*, 10 Wright, Pa. 192; *Lampar-
ter v. Wallbaum*, 45 Ill. 444.

⁴ Compare with post, § 628.

⁵ *Hawkesworth v. Thompson*, 98
Mass. 77; *Wilson v. Peto*, 6 Moore,
47; *Cary v. Webster*, 1 Stra. 480;
Wright v. Wilcox, 19 Wend. 343; *Vary
v. Burlington, &c. Rld.* 42 Iowa, 246;
Gulf, &c. Ry. v. Dorsey, 66 Texas, 148;
Burrows v. March Gas, &c. Co. Law
Rep. 5 Ex. 67, 7 Ex. 96.

or the mere mental satisfaction that nothing was done, would not constitute a contribution by will.¹ If the negligence consisted in forgetfulness, it could not be augmented by a solicitation to forget. But there probably are forms of negligence to which there may be a contribution by mere will; in such a case, the contributor will be responsible.

§ 527. **Responsible combining with Irresponsible Force.** — It being thus no protection to a wrong-doer that the acts of responsible persons were united with his act or intent,² *a fortiori* the combining with it of irresponsible forces, such as those of nature or a disease, will not relieve him.³ For example, if one inflicts injury on a sick person, the latter's suit for damages is not taken away by a showing that, if he had been well, no disease operating with the wrong, he would have suffered no harm.⁴

§ 528. **New Force Subsequent.** — One's responsibility for his acts is not limited to their immediate effects. He is liable also for their natural and probable consequences, if of a magnitude justifying the law's interference, and not too remote. Nor is it material whether those consequences come from the acts alone, or from them and subsequent independent forces operating with them, provided those forces are of a sort reasonably to be anticipated; if not of this sort, and they took occasion of his act to work an independent injury which he could not probably have foreseen, he is not answerable. In addition to the explanations and illustrations given in a preceding chapter,⁵ something will be useful here. Thus, —

§ 529. **Things in Street.** — If one negligently leaves a barrel of fish brine open in a public street, it is a natural and probable thing that some passer-by will pour it out. Then, this

¹ Ante, § 523.

² "It is no excuse for the negligence of the defendant that another person's negligence contributed to the injury." Church, C. J. in *Robinson v. New York Cent. & C. Rld.* 66 N. Y. 11, 13; *Crawfordsville v. Smith*, 79 Ind. 308; *Slight v. Gutzlaff*, 35 Wis. 675; *Union Ry. &*

Co. v. Shacklet, 119 Ill. 232; *Tate v. Missouri, & C. Ry.* 64 Mo. 149.

³ Ante, § 39, 518.

⁴ *Allison v. Chicago, & C. Rld.* 42 Iowa, 274; *Louisville, & C. Ry. v. Jones*, 108 Ind. 551. See also *Whitehead v. Mathaway*, 85 Ind. 85.

⁵ Ante, § 35, 36, 40-48.

having been done, if a cow lawfully¹ in the street drinks the brine and is injured, its owner may recover the damages of the person who put it there.² And anything calculated to frighten horses, thus set in a highway, will bring the corporation answerable for its condition under liability to a traveller harmed by his horses taking fright and running; such being the natural and probable consequence of the neglect.³ On this principle, where one negligently left some boards in the middle of the street, and a second person having a load of barrels passed over them, and the boards both rattled and caused a rattling of the barrels, which together frightened the well-broken and carefully driven horses of a third person following, so that they started aside and threw him from his wagon and injured him, he was permitted to maintain an action against the first person. "If," said Appleton, C. J. "the boards had not been wrongfully left in the street they would not have rattled or caused the rattling of the barrels; and, had there been no rattling of boards and barrels, the plaintiff's horse would not have been frightened nor the plaintiff injured."⁴ On the other hand, —

§ 530. *Continued.* — It is not the natural and probable consequence of a properly constructed coal-hole in a sidewalk that a stranger will come along and wrongfully break the stone supporting its cover. Then, if the stone is so broken without the knowledge of the owner, the latter is not responsible to a pedestrian injured by the turning of the cover.⁵ So, if a railroad puts its bridge over a street at the proper height, it is not the natural and probable consequence that the borough will raise the street-bed; and, if it does, the former is not liable to a teamster struck by the bridge.⁶ Likewise, in

¹ *McCarthy v. Portland*, 67 Maine, 167.

² *Henry v. Dennis*, 93 Ind. 452. Another case similar is *Pastene v. Adams*, 49 Cal. 87.

³ *Bennett v. Fifield*, 13 R. I. 139. And compare with *Dimock v. Suffield*, 30 Conn. 129; *Kingsbury v. Dedham*, 13 Allen, 186; *Bartlett v. Hooksett*, 48 N. H. 18; *Foshay v. Glen Haven*,

25 Wis. 288; *Macomber v. Nichols*, 34 Mich. 212; *Spaulding v. Winslow*, 74 Maine, 528; post, § 976

⁴ *Lake v. Milliken*, 62 Maine, 240. See *Stone v. Hubbardston*, 100 Mass. 49; *Clark v. Lebanon*, 63 Maine, 393; *Merrill v. Clarendon*, 58 N. H. 468.

⁵ *Wolf v. Kilpatrick*, 101 N. Y. 146.

⁶ *Gray v. Danbury*, 54 Conn. 574.

the running of a railroad, it is not to be anticipated that, at a particular place, an outside person will misplace a switch just as a train is approaching; and, if this is done, and an accident follows, the road cannot be compelled to compensate a person injured.¹ If, in these several cases, some duty of foresight had been neglected, the legal result would have been the opposite one, as stated in the last section. Now,—

§ 531. **Act Wrongful or not.**—If it is objected that in the cases last mentioned the act complained of was not in its nature wrongful, the reply is that, as to the consequence now in contemplation, it would make no difference if it was. This is illustrated in preceding chapters.² But the instances in the books are numberless. Thus, the body of a riding-wagon, left on a highway, was laid up edgewise against some bushes outside of the travelled part. This was a sort of obstruction which, in circumstances quite supposable, would render the town liable for a resulting accident; but, as its natural and probable consequence was not to frighten a properly trained and well-driven horse, the court would not compel the town to pay damages when, in fact, a horse was frightened by the wagon-body and did mischief.³ For a railroad to bring to a place on its line, contrary to a statute, cattle having a contagious disease, is a wrong leading to a civil liability;⁴ but, if some outside person then transports them to another locality where they infect other cattle, the road cannot be made to pay this damage.⁵ We have a like illustration in—

§ 532. **Slander and Libel.**—If one utters a slander, its repetition by the hearer is not quite contrary to the common drift of wickedness; but this would be an act of wrong-doing, and in the absence of proof the law presumes that men do right, not wrong.⁶ The consequence whereof is, that the utterer of

¹ *Keeley v. Erie Ry.* 47 How. Pr. 256.

² Ante, § 41-43, 47, 453, 455, compared with § 456, 457. And see the expositions of Cockburn, C. J. in *Clark v. Chambers*, 3 Q. B. D. 327, 336-338. See further, as bringing to view some of

the limits of the doctrine, ante, § 176-184.

³ *Nichols v. Athens*, 66 Maine, 402.

⁴ Ante, § 132.

⁵ *Surface v. Hannibal, &c. Rld.* 63 Mo. 452. Consult ante, § 42, 43.

⁶ 1 Bishop Crim. Proced. § 1103.

a slander cannot be made to pay damages for its unauthorized repetition;¹ and it is the same of a libel, which a second publisher copies.²

§ 533. **Subsequent Partaker or Actor.**—One whose subsequent doing increases the evil of another's previous act, or adds a new injury, is responsible.³ Thus,—

§ 534. **Repeating Slander.**—A person who repeats a slander is answerable for it,⁴ even though he does not intend to or does not convey the idea that it is true,⁵ or though he disclaims belief in its truth,⁶ or otherwise publishes it as a rumor,⁷ or announces its source.⁸

§ 535. **Wrong-doers as between Themselves.**—Since, with few exceptions, a person who has suffered from what several have done in combination may collect his damages from any one of them,⁹ and since practically he will fall upon the one from whom he thinks he can get them most easily, it becomes specially important to consider the relations of the wrong-doers to one another. We have seen¹⁰ that, in cases of conscious wrong, one who has paid the whole cannot compel contribution from the others, because the courts sit to enforce the laws, and not to assist men in attempts to break them; but where the injury was unmeant there may be contribution, for there the liability came from the law's adjustment of rights between parties, not from a purposed law-breaking.¹¹ There is another class of cases, wherein, as between the parties, the sole responsibility is on one, while another is simply

¹ *Hastings v. Stetson*, 126 Mass. 329; *Shurtleff v. Parker*, 130 Mass. 293; *Parkins v. Scott*, 1 H. & C. 153, 8 Jur. N. S. 593.

² *Clifford v. Cochrane*, 10 Bradw. 570. Consult *Zier v. Hoffin*, 33 Minn. 66; *Emmens v. Pottle*, 16 Q. B. D. 354.

³ *Ante*, § 64.

⁴ *Evans v. Smith*, 5 T. B. Monr. 363; *Stowell v. Beagle*, 79 Ill. 525.

⁵ *Kenney v. McLaughlin*, 5 Gray, 3.

⁶ *Branstetter v. Dorrrough*, 81 Ind. 527.

⁷ *Fowler v. Chichester*, 26 Ohio State, 9.

⁸ *McDonald v. Woodruff*, 2 Dil. 244. See *Bradley v. Cramer*, 66 Wis. 297.

⁹ *Ante*, § 518-522.

¹⁰ *Ante*, § 56.

¹¹ And see, besides the cases cited at the preceding place, *Pearson v. Skelton*, 1 M. & W. 504; *Thweatt v. Jones*, 1 Rand. 328; *Dupuy v. Johnson*, 1 Bibb, 562; *Wilford v. Grant*, Kirby, 114; *Peck v. Ellis*, 2 Johns. Ch. 131; *Attorney-General v. Wilson*, Craig & P. 1; *Acheson v. Miller*, 2 Ohio State, 203; *Moore v. Appleton*, 26 Ala. 633; *Hunt v. Lane*, 9 Ind. 248; *Bailey v. Bussing*, 28 Conn. 455.

liable with him to the person injured; then, if there is no obstruction from the principle just stated, when the latter has been made to pay he can recover the whole of the former. A familiar example of this is where one has obstructed a street, then a third person has been injured and has obtained damages of the municipal corporation holden to keep it in repair; here the corporation was the mere victim, and after having paid the damages it may recover them of the original wrongdoer. Added to which, if it was sued, and it notified the party responsible, with a request to defend, it may have its costs and counsel fees.¹ And this is the rule in other cases within the same principle.² But if the one seeking indemnity partook consciously in the wrong, his suit will fail.³

§ 536. *The Doctrine of this Chapter restated.*

In civil jurisprudence, one's responsibility for his wrong is not always commensurate with his deserts. If fifty persons combine to harm a man, each deserves to be made to pay the whole damage; for his wickedness is the same as though he had done it alone. And very properly this is the rule in criminal jurisprudence. Even in civil, the injured person may obtain his whole compensation out of any one of them. The reason why he cannot get it severally of all is that he has in himself no just claim to have a loss repaired but once. When, after the suffering party has received his damages, the wrong-doers attempt an adjustment between themselves, the courts will not take jurisdiction to enforce a claim of one who was a conscious partaker in the wrong. But in the other class of cases, wherein the liability grew out of the relation in which the law placed the party, and he did not have the purpose to break the law, an equitable adjustment will be compelled.

¹ *Westfield v. Mayo*, 122 Mass. 100; *Portland v. Atlantic, &c. Rld.* 66 Maine, 485; *Minneapolis Mill Co. v. Wheeler*, 31 Minn. 121; *Western, &c. Rld. v. Atlanta*, 74 Ga. 774; *Chicago v. Rob-*

bins, 2 Black, 418, 422, 425; *Durant v. Palmer*, 5 Dutcher, 544.

² *Gray v. Boston Gas-light Co.* 114 Mass. 149; *Simpson v. Mercer*, 144 Mass. 413.

³ *Churchill v. Holt*, 131 Mass. 67.

CHAPTER XXVIII.

HUSBAND AND WIFE, COVERTURE.

§ 537. **Complications of Subject.** — In our unwritten law, as administered by the courts of common law and of equity, the civil rights and obligations which grow out of matrimony are, though not difficult to understand, a good deal complicated. When the subject is examined through the digests and the text-books of the digest sort, it seems a tangle made up of arbitrary rule and inharmonious judicial rulings. But if we approach this tangle rightly, beginning where we ought, and drawing out the juridical thread through its source of reason, — not the reason of the philanthropic theorist, but the reason of the law, — we shall find all plain, and easy to be remembered. The greater complications relate to property rights and contracts, as to which the two systems of equity and law mingle, but they are not within the scope of this volume. The rules which pertain to our present subject have been, with the others, explained by the author in another work.¹ And it

¹ Bishop on Married Women. At the time of the present writing, this work is substantially out of print. The first volume was exhausted some years ago, yet a few copies of the second remain, simply because intending purchasers cannot find copies of the first to go with them. I think the book sold somewhat faster than the average of books on the subject. But, not wishing to put out a new edition of it unless edited by myself, I have thus far chosen to spend my time on works which, I could foresee, would have more readers. This one was and is greatly needed ;

and it would have been an eminent success in the bookseller's sense if I could have made a beginning in obtaining *readers* for it. There were within my power no means for doing this. There never had been on this subject any work of a higher order than a digest, or, therefore, adapted in any considerable degree to dispel its apparent difficulties. My book was written to dispel them, and it did so. But so wide were the complications of the subject, involving principles special to this department of jurisprudence, also blendings of law and equity, and in various ways constituting

would be contrary to his method of authorship to repeat here what he has sufficiently illustrated elsewhere. This chapter was necessary to the completion of the subject of the volume, but it will suffice to add to this introduction a few pointings of the law, without accompanying references to the authorities. Thus,—

§ 538. “**One Flesh**” — **Male “Head.”** — The common law of husband and wife rests on the foundation principle that “they twain shall be one flesh,”¹ united in a way to render the male part the “head.” Hence,—

§ 539. **When Wife liable for Torts, when not.** — When the female part of this one flesh — namely, the wife — is in the presence of this male head her husband, her volitions are looked upon as, *prima facie*, movements impelled by the head, for which she is not responsible, but he is; though it may be affirmatively shown against her that a particular act was vol-

a whole whereof the parts could not be made comprehensible except to those who understood the other parts and the combined whole, that it was quite beyond any power of language to let the daylight into the subject in a way fully satisfying the minds of lawyers, however able, who merely consulted it for particular questions as they arose, without giving it a preliminary reading. The work was written to be read. In the nature of the case it could not be and it was not, when not read, very much more helpful than a mere digest, or the books which had gone before. The profession had never looked upon the subject as one susceptible of being made luminous, or even as proper for any thorough instruction to students. I do not think there ever was a practitioner, a judge, or a law student who even so much as entertained the suggestion of *reading* this work of mine. Simply it was used as a digest is, therefore with little more profit. And the thought that it or any other book on the subject can be made more useful has probably never entered a half dozen minds in the entire country. I will

illustrate this by saying, that a very eminent lawyer of my acquaintance who, I know, reads and appreciates my works generally, instead of reading this, wrote me, — “You may have removed the difficulties of the subject, but I do not believe it.” If I could have begun to untangle things in the *right place*, — namely, in the professional mind of the country, — I should have made a great success of this Married Women book. And those gentlemen who are anxious to see a new edition, some of whom have written me regarding it, shall be gratified if, during my life and ability to work, a way can be devised for getting hold of the thread in what I have thus shown to be the right place. Perhaps, in the absence of such device, I may yet prepare a new edition; hoping that, in some way which I cannot now foresee, there may be found for it *readers*, not merely persons who will make it a substitute for a digest. The usefulness of a digest I do not dispute; but the mere supplying of that sort of want is not within my particular line of labor.

¹ Matt. xix. 5; Mark x. 8.

untarily hers, and then she will be liable for it. For what she does in his absence she is liable, even though it was previously instigated by him; the law accepting the obvious fact that, the marital head not being present, she is now acting from her own.

§ 540. **When Husband liable.** — Since, in legal contemplation, the husband has his wife in subjection when he is with her, he is answerable for the torts she commits in his presence; and commonly, as just seen, she is excused because presumptively impelled by his marital power. He is also liable for her torts committed in his absence, if he instigated them; otherwise he is not. Now, —

§ 541. **How the Suit.** — The law requires the husband duly to protect his wife. At the common law, under the rules whereof rather than those of equity questions of tort are nearly all litigated, the husband must always be a party with his wife in her suits, whether she is plaintiff or defendant. When she has become alone liable for a tort, the injured party must sue her, and must also join him as co-defendant. When she is not liable by reason of her act being deemed in law the husband's, she must not be made a party defendant, but the suit must be against him alone. Therefore it is common to say in the books, that a husband is answerable for all his wife's torts. In truth, he is so only as just stated. So that, if she commits a tort in his absence and without his instigation, then he dies, his estate is not holden, but the widow must respond personally, the same as though she had been discoverer when the act was done.

§ 542. **Torts to Wife.** — One who inflicts a civil wrong upon the wife is answerable to her, not the husband; yet, as just seen, the husband, without whose protection she cannot act, must join her as co-plaintiff in the suit. Still, if he has suffered pecuniarily, — as, if she has been wounded, casting upon him expense in her cure, or loss of her services, — this damage is his, and he may and should sue for it alone. Nor, though he dies, can she maintain a suit in her own name for this damage to him, but she can sue for the damage to herself.

Modern Statutes, — changing the common-law relations of husband and wife as to property, have not greatly interfered with the foregoing rules. In some degree they have. It is not deemed best to pursue the subject further in the present work.

§ 543. *The Doctrine of this Chapter restated.*

The law of husband and wife is a complication of the rules of equity, of those of the common-law courts, and of principles growing out of peculiarities in the relationship. Special study, supplementing a general knowledge of the legal system, is indispensable to its proper understanding. The non-contract part of this law is simpler than the contract part, because there is in it a less mixture of equity with the common law. Some leading rules are stated in the foregoing sections, but their repetition is unnecessary. Every law student and every practitioner should give a special study to this subject, not that it is particularly difficult, but it has principles not found elsewhere in the law, and interminglings of doctrine comprehensible only on viewing the parts in connection with the whole.

CHAPTER XXIX.

PARENT AND CHILD, INFANCY.

§ 544. Introduction.

545-548. Restraints and Discipline of Infancy.

549-552. Parent's Liability for Torts of Child.

553-559. His Rights as to Torts to Child.

560-569. Liabilities of Infants for their Torts.

570, 571. Rights of Infants as to Torts suffered.

572-590. Negligence and Contributory Negligence.

591. Doctrine of Chapter restated.

§ 544. **How Chapter divided.** — We shall consider, I. The Restraints and Discipline of Infancy; II. The Liability of the Parent for the Torts of the Child; III. The Rights of the Parent as to Torts inflicted on the Child; IV. The Liabilities of Infants for their Torts; V. The Rights of Infants as to Torts suffered by them; VI. Negligence to Infants, their Contributory Negligence, and that of Persons having a Care of them.

I. *The Restraints and Discipline of Infancy.*

§ 545. **Under what Subjection.** — For the good of the infant,¹ the common law holds that, with exceptions not now to be considered, every male or female child not twenty-one years old² must be more or less, according to his age, special needs, and the particular case, controlled by an adult will.³ Ordinarily the authority is in the father;⁴ if he dies, it passes,

¹ 1 Bishop Crim. Law, § 880 et seq.

² Bishop Con. § 893, 894; Commonwealth v. Morris, 1 Philad. 381.

³ And see 2 Bishop Mar. & Div. § 525-559.

⁴ 1 Bl. Com. 452, 453; Gates v. Renfro, 7 La. An. 569; People v. Cooper, 8 How. Pr. 288.

yet not in all respects fully, to the mother;¹ and, within still narrower limits, it may be exercised by any person who has received the child into membership in his family, and who thus or otherwise stands to it *in loco parentis*.² As to which, the purposes of this chapter do not require the drawing of more exact lines. Now, —

§ 546. **Correction — Restraint.** — The controlling person, whether the father,³ the mother, or the one *in loco parentis*,⁴ may inflict on the minor, in proper circumstances, moderate and reasonable chastisement, or exercise over the person other restraint, within the principles explained by the author in another work.⁵ On the other hand, —

§ 547. **Protection.** — The person in whose care is the child should extend to it due protection.⁶ For example, one having at service in his family a girl of eleven years, without knowledge and experience, should not suffer her to go into the extreme cold insufficiently clad; and, if he does, and she is injured by being frozen, he must answer to her in damages.⁷ Here the wrong consists of a mere neglect to impart knowledge, and exercise needed constraint. Where it goes further, into active misleading, the case is worse. Thus, a girl of tender years at service experiencing her first menstruation, was told by her employers that it was a dangerous disease, leading to insanity and death, and the only known remedy was severe and unremitting labor. She was thereby enticed into working beyond her strength, and injured. “By the strongest principles of morality and good faith,” said the court, “they

¹ Osborn v. Allen, 2 Dutcher, 388; Ohio, &c. Rld. v. Tindall, 13 Ind. 366; Commonwealth v. Murray, 4 Binn. 487.

² Snowden v. The State, 12 Texas Ap. 105; Whitaker v. Warren, 60 N. H. 20.

³ Commonwealth v. Coffey, 121 Mass. 66; Pierce v. Millay, 62 Ill. 133.

⁴ Snowden v. The State, 12 Texas Ap. 105; Bleke v. Grove, 1 Keb. 661. Otherwise where the minor is a mere servant to one not *in loco parentis*. Tinkle v. Dunivant, 16 Lea, 503.

⁵ 1 Bishop Crim. Law, § 880-884.

⁶ Something of this sort, not quite definable, is due to an uninstructed employee, who is a minor, beyond what would be required if he were of mature age. Atlanta Cotton Fac. v. Speer, 69 Ga. 137; Rock v. Indian Orchard Mills, 142 Mass. 522, 528; Hill v. Gust, 55 Ind. 45; O'Connor v. Adams, 120 Mass. 427, 431; Louisville, &c. Ry. v. Frawley, 110 Ind. 18; Jones v. Florence Mining Co. 66 Wis. 268; Hickey v. Taaffe, 105 N. Y. 26.

⁷ Nelson v. Johansen, 18 Neb. 180.

should have given her reasonable care and honest counsel." And so her father's action for damages was sustained.¹

§ 548. **Coercion.**—Infancy, as to coercion by the superior, is different from coverture. It is never a justification for an infant sued for a tort,² or indicted for a crime,³ that he did it by command of one in authority over him.

II. *The Liability of the Parent for the Torts of the Child.*

§ 549. **Not Liable.**—The father, simply as parent, is not answerable for any tort committed by his minor child.⁴ Thus,—

§ 550. **Examples.**—If his daughter sets his dog on a neighbor's hogs and kills them,⁵ or if his son negligently shoots a neighbor's horse,⁶ or if the son commits any other trespass,⁷ the father cannot be made to pay the damages. But,—

§ 551. **Child as Servant.**—Though the relation of parent and child does not alone render the latter the servant of the former, the child often or commonly is such; whereupon the facts may be shown by proofs,⁸ or inferred from the circumstances.⁹ In which case, the parent will be to the same extent responsible for the child's acts as for those of any other servant. Thus,—

§ 552. **Instances.**—Where a boy, following the usage of the family, is driving them to church, if he recklessly runs into another's team the father is answerable.¹⁰ Even where a minor son was employed by the father to clear a parcel of land, then did it so negligently that a neighbor's property was destroyed by fire, the father was required to pay the damages.¹¹ And if a parent permits his children on his own premises to shoot and fire pistols, and thereby they frighten

¹ *Larson v. Berquist*, 34 Kan. 334, opinion by Johnston, J.

² *Smith v. Kron*, 96 N. C. 392.

³ 1 Bishop Crim. Law, § 355, 367, 884 a.

⁴ Bishop Con. § 900; *Edwards v. Crume*, 13 Kan. 348; *Wilson v. Garrard*, 59 Ill. 51; *Teagarden v. McLaughlin*, 86 Ind. 476, 478.

⁵ *Tift v. Tift*, 4 Denio, 175.

⁶ *Baker v. Morris*, 33 Kan. 580.

⁷ *McCalla v. Wood*, 1 Penning. 86.

⁸ *Swartz v. Hazlett*, 8 Cal. 118.

⁹ Ante, § 373.

¹⁰ *Schaefer v. Osterbrink*, 67 Wis. 495.

¹¹ *Teagarden v. McLaughlin*, 86 Ind. 476.

the horses of a passer-by in the highway, he must make compensation for the injury.¹ But if the son, though a servant, does a wrongful thing outside of the line of his service, the father will not be responsible for it, under circumstances in which an ordinary master would not be.² There may be cases wherein opinions will differ; as, where a father wilfully and negligently suffered his boy of eleven years to have a loaded pistol, he was held by the majority of a divided court not liable to a person injured thereby.³ Evidently he would not be so from the mere parental relationship; but, by a doctrine which we have already seen,⁴ the entrusting of loaded firearms to so young a person is an act of carelessness commonly deemed to draw with it responsibility.

III. *The Rights of the Parent as to Torts inflicted on the Child.*

§ 553. **The Principle.** — One who injures another by a wrongful act must make good the damages. So that, whenever a parent has suffered a legal harm from anything tortiously done to his child, he may have compensation from the doer.⁵ Hence, —

§ 554. **Defined.** — One who commits a tort on a child must answer to the father,⁶ the widowed mother,⁷ or any other person *in loco parentis*,⁸ for any expense thereby cast upon him, and any loss of the child's services to which he is entitled. The case is similar to that of enticement, already explained,⁹ though the doctrines may not be identical at every point. We shall see, in the fifth sub-title, that the child may maintain also his separate suit, but we are here inquiring after the parental claim. To illustrate, —

¹ *Hoverson v. Noker*, 60 Wis. 511.

² *Way v. Powers*, 57 Vt. 135.

³ *Hagerty v. Powers*, 66 Cal. 368.
Compare with *Poland v. Earhart*, 70 Iowa, 285.

⁴ Ante, § 151.

⁵ Ante, § 364, 365, and other places throughout the chapter.

⁶ *Hussey v. Ryan*, 64 Md. 426; *Fort Wayne, &c. Ry. v. Beyerle*, 110 Ind. 100.

⁷ *Ohio, &c. Rld. v. Tindall*, 13 Ind. 366; *Natchez, &c. Rld. v. Cook*, 63 Missis. 38.

⁸ *Whitaker v. Warren*, 60 N. H. 20.

⁹ Ante, § 373-377.

§ 555. **Instances.** — If a dog, permitted by its owner with knowledge of its vicious propensities to run at large, bites and injures a minor child,¹ or if a man beats the child,² or abducts a minor daughter,³ or wrongfully inflicts on a minor child any physical injury whatever,⁴ or harms the child through actionable negligence,⁵ the parent may recover his pecuniary damages, such as the loss of service, the trouble and expense of nursing, and the like.⁶ But, —

§ 556. **Exemplary — Mental Suffering.** — In this suit, unlike that by the minor himself, there are no exemplary damages.⁷ Where the father was plaintiff, and it appeared that, in addition to his loss through the sickness of the child, he had suffered a loss through the consequent sickness of its mother his wife, he was permitted to recover for the latter also.⁸ But the parent's mere mental suffering cannot be taken into the account.⁹ So, —

§ 557. **Personal to Child.** — For injuries merely personal to the child the parent has no right of action, the damages for them being exclusively the child's.¹⁰

§ 558. **Prospective Services.** — Where the child was two and a half years old, and so incapable of rendering service, and there was no proof of actual expense incurred by the parent, it was held, in an English case, that nothing could be recovered.¹¹ But, by the American doctrine, perhaps also by

¹ *Durden v. Barnett*, 7 Ala. 169; 40; *Augusta Factory v. Barnes*, 72 Ga. Arnold v. Norton, 25 Conn. 92. 217.

² *Jones v. Brown*, 1 Esp. 217, Peake, 233; *Cowden v. Wright*, 24 Wend. 429.

³ *Moritz v. Garnhart*, 7 Watts, 302.

⁴ *Vanhorn v. Freeman*, 1 Halst. 322; *Hammer v. Pierce*, 5 Harring. Del. 171; *Hoover v. Heim*, 7 Watts, 62.

⁵ *Wilt v. Vickers*, 8 Watts, 227; *Covington Street Ry. v. Packer*, 9 Bush, 455; *Kennard v. Burton*, 25 Maine, 39.

⁶ *Rogers v. Smith*, 17 Ind. 323; *Black v. Carrollton Rld.* 10 La. An. 33; *Arnold v. Norton*, 25 Conn. 92; *Bell v. Central Rld.* 73 Ga. 520.

⁷ *Black v. Carrollton Rld.* 10 La. An. 33; *Donnell v. Sandford*, 11 La. An. 645; *Sherman v. Johnson*, 58 Vt.

⁸ *Ford v. Monroe*, 20 Wend. 210.

⁹ *Cowden v. Wright*, 24 Wend. 429; *Flemington v. Smithers*, 2 Car. & P. 292; *Hunt v. Wotton*, T. Raym. 259, 260; *Covington Street Ry. v. Packer*, 9 Bush, 455.

¹⁰ *Durkee v. Central Pac. Rld.* 56 Cal. 388.

¹¹ *Hall v. Hollander*, 4 B. & C. 660. "I should think it quite questionable whether that case can be considered as law here." Cowen, J. in *Hartfield v. Roper*, 21 Wend. 615, 617. Compare *Jones v. Brown*, 1 Esp. 217, Peake, 233. And see *Matthews v. Missouri Pac. Ry.* 26 Mo. Ap. 75.

the English, and certainly by the legal reasons controlling the question, if the injury is such as to create any disqualification for service before the child reaches the age of majority, this loss should be taken into the account, and it will sustain the action.¹ And if there is no loss of service, the parent may still have his suit for the other expenses incurred.²

§ 559. **Emancipation.** — The person suing, in order to obtain compensation for the loss of services, must have some legal interest in them.³ Still, in the case of the father,⁴ the emancipation of the child, or particularly the permitting of him to receive his own wages,⁵ does not necessarily take away all right to his future services. So that, if the child is injured, the father may have damages for the loss of support.⁶

IV. *The Liabilities of Infants for their Torts.*

§ 560. **Distinctions.** — A babe at the breast and a man of mature age are very differently related to society. And the responsibilities of infants vary with their years. So reason teaches; and so the law holds, but in a somewhat technical way.⁷ Thus, —

§ 561. **In Criminal Law,** — one under seven years of age is conclusively incapacitated to commit any crime, however precocious he may be in fact. One between seven and fourteen is *prima facie* incapable, but capacity in fact may be shown against him. One over fourteen stands on the same footing as an adult.⁸

§ 562. **For Contract** — the infant has a partial or imperfect capability in law; depending on rules partly technical, yet not with distinctions as to the ages of seven and fourteen.⁹

¹ Ante, § 374; Bay Shore Rld. v. Harris, 67 Ala. 6; Hussey v. Ryan, 64 Md. 426; Texas, &c. Ry. v. Morin, 66 Texas, 133; Natchez, &c. Rld. v. Cook, 63 Missis. 38; Drew v. Sixth Avenue Rld. 26 N. Y. 49.

² Dennis v. Clark, 2 Cush. 347; Sykes v. Lawlor, 49 Cal. 236.

³ Mercer v. Jackson, 54 Ill. 397.

⁴ Ante, § 380.

⁵ Stiles v. Granville, 6 Cush. 458; Donegan v. Davis, 66 Ala. 362.

⁶ St. Joseph, &c. Rld. v. Wheeler, 35 Kan. 185; Soldanels v. Missouri Pac. Rld. 23 Mo. Ap. 516. See Natchez, &c. Rld. v. Cook, 63 Missis. 38.

⁷ Bishop Con. § 895.

⁸ 1 Bishop Crim. Law, § 363.

⁹ Bishop Con. § 892-946.

§ 563. **In Torts** — the rules follow neither those of crime nor of contract. They do not distinguish ages, as in the criminal law, nor yet do they adopt the technicalities established in contract. The doctrine may be defined thus, —

§ 564. **Defined.** — Though, like an adult, an infant may be excused for his wrongful act by any lack of mental capacity,¹ and though, unlike an adult, an immaturity of age may be such as to exempt him from the *prima facie* presumption of capacity, still mere infancy, or the mere fact of not having attained any standard number of years, does not disqualify the infant for committing a tort.² For example, —

§ 565. **Instances.** — A minor is liable, like a person of age, for his neglects,³ for his trespasses,⁴ for his assaults,⁵ commonly for his frauds,⁶ for his unlawful conversions of goods,⁷ for tortiously taking money,⁸ for the wrong of bastardy,⁹ and generally for whatever may be the subject of an action *ex delicto*.¹⁰ The limitation of this doctrine is that, —

§ 566. **Tortious Breach of Contract.** — If the particular wrong is both a tort and breach of contract, — not a violation also of a duty which the law had superinduced upon and above the contract,¹¹ — then, if infancy would be a defence to an action on the contract, it will be equally such should the injured party elect to sue in tort.¹² For example, if an infant

¹ Ante, § 495-516.

² Bishop Con. § 897, 901, 902.

³ Way v. Powers, 57 Vt. 135; Baker v. Morris, 33 Kan. 580.

⁴ Tift v. Tift, 4 Denio, 175.

⁵ Bullock v. Babcock, 3 Wend. 391; Sikes v. Johnson, 16 Mass. 389.

⁶ Bishop Con. § 902; Wallace v. Morris, 5 Hill, N. Y. 391 (commented on in Campbell v. Perkins, 4 Selden, 430, 440); Eckstein v. Frank, 1 Daly, 334; Matthews v. Rice, 31 N. Y. 457; Rice v. Boyer, 108 Ind. 472; Catts v. Phalen, 2 How. U. S. 376, 382.

⁷ Mills v. Graham, 1 New Rep. 140; Baxter v. Bush, 29 Vt. 465; Vasse v. Smith, 6 Cranch, 226; Lewis v. Littlefield, 15 Maine, 233; Walker v. Davis, 1 Gray, 506; Fitts v. Hall, 9 N. H. 441.

⁸ Elwell v. Martin, 32 Vt. 217.

⁹ Chandler v. Commonwealth, 4 Met.

Ky. 66.

¹⁰ School District v. Bragdon, 3 Fost. N. H. 507; Oliver v. McClellan, 21 Ala. 675; Guidry v. Davis, 6 La. An. 90; Christian v. Welch, 7 La. An. 533; Scott v. Watson, 46 Maine, 362; Word v. Vance, 1 Nott & McC. 197; Hanks v. Deal, 3 McCord, 257; Humphrey v. Douglass, 10 Vt. 71; West v. Moore, 14 Vt. 447; Huchting v. Engel, 17 Wis. 230.

¹¹ Ante, § 72-77.

¹² Bishop Con. § 901; Jennings v. Rundall, 8 T. R. 335; Burnard v. Haggis, 14 C. B. n. s. 45, 9 Jur. n. s. 1325; Root v. Stevenson, 24 Ind. 115.

supercargo disobeys instructions, this, though a wrong, extends no further than a mere breach of his contract of employment; so, as his infancy would protect him in a suit on the contract, it will do the same in an action of tort.¹ The obvious reason for which is, that, since a release of the breach of contract would be a release of the tort, both being the same thing, the same effect must be given to any other matter of defence. The adjudications are not quite harmonious as to what facts will bring a case within this doctrine, and what will render the tort an independent wrong, for which infancy will be no defence. The true distinction is believed to be that, where the violation of contract and the tortious act are identical, infancy is a defence, but it is not such where the infant does anything in excess of such mere violation, and in breach of a duty which the law had created, or superinduced upon the contract. Thus, —

§ 567. **No Defence.** — In England, an infant hired a mare for a ride along the road, being expressly told that she was not fit for leaping. But while in his possession, she was put to a fence, she fell on a stake, and was so injured that she died. There was, therefore, a violation of a duty which the law cast upon him, it was more than a mere breach of contract. "I agree," said Byles, J. "that, where there is an action of contract against an infant, you cannot change it into one *ex delicto*. Here, however, a horse is hired for one purpose and it is used for another." So infancy was held to be no bar to a suit for the damage.² And if a minor hires a horse to drive to one place and drives it to another, he is in like manner answerable.³

§ 568. **Some other Explanations** — appear in the author's "Contracts," but it is needless to repeat them.⁴

§ 569. **Already,** — in a preceding chapter, we have seen how far a defective understanding or want of evil intent excuses the otherwise wrongful act.⁵ We have no such cases under

¹ Vasse v. Smith, 6 Cranch, 226.

v. Wiley, 23 Vt. 355; Penrose v. Curren, 3 Rawle, 351.

² Burnard v. Haggis, 14 C. B. N. s. 45, 9 Jur. N. s. 1325.

⁴ Bishop Con. § 901-903.

³ Freeman v. Boland, 14 R. I. 39; Homer v. Thwing, 3 Pick. 492; Towne

⁵ Ante, § 495-516.

the head of infancy as will render a continuation of the elucidations desirable here.

V. The Rights of Infants as to Torts suffered by them.

§ 570. **General.** — Though the parent can maintain an action to make good the loss he has sustained from a tort to the child, as already explained,¹ the child also, however immature in years, can sue for his loss and sufferings,² and neither action will be any impediment to the other.

§ 571. **Recover what.** — The infant, in such an action, cannot recover what the parent has expended in his cure;³ or, if he has not been emancipated,⁴ for his diminished capacity to earn money during minority;⁵ these being losses to the parent, not to him. But he may have the proper damages for his own losses and sufferings.⁶

VI. Negligence to Infants, their Contributory Negligence, and that of Persons having a Care of them.

§ 572. **Complications and Differences** — **How here.** — Connected with this sub-title there are more than the average complications of legal doctrine and differences of opinion upon them. We shall trace the subject so far as to obtain a view of its principles, of the reasonings applicable, and of the practical methods of applying the principles, together with the needful illustrative instances. But more of detail would not be within the plan of the present work. Nor, if it were, would it be particularly helpful in practice; since the new cases will seldom be repetitions of the old, and since the practitioner is better served than inexperienced young lawyers

¹ Ante, § 553-559.

² Ante, § 557; *Rogers v. Smith*, 17 Ind. 323; *Hartfield v. Roper*, 21 Wend. 615, 617; *Callahan v. Bean*, 9 Allen, 401; *Wright v. Malden, &c. Rld.* 4 Allen, 283; *Lynch v. Nurdin*, 1 Q. B. 29; *Smith v. Peabody*, 106 Mass. 262; *Mackey v. Vicksburg*, 64 Missis. 777.

³ *Collins v. Lefevre*, 1 Fost. & F. 436.

⁴ Ante, § 559.

⁵ *Texas, &c. Ry. v. Morin*, 66 Texas, 225.

⁶ Ante, § 554, 557; *Mackey v. Vicksburg*, 64 Missis. 777; *Hopkins v. Virgin*, 11 Bush, 677; *Austin v. Great Western Ry. Law Rep.* 2 Q. B. 442.

commonly suppose, when simply furnished with the principles and their practical methods, and compelled to work out for himself their applications to the cases he may have in hand.

§ 573. **Principles.** — The books contain many cases, more or less conflicting with one another, and more or less in departure from the just line of decision, wherein it is obvious that the principles which the established law had provided to govern them were overlooked — not denied, but simply not thought of — by the judges deciding them and delivering the opinions. It will, therefore, help us throughout the elucidations of this sub-title to call here to mind some of those principles, as explained in preceding chapters; namely, —

1. A person who has done any part of a wrong working harm to another, or even contributed by his will to it, is responsible to him in damages for the entire harm, however many other individuals, forces, and things may have co-operated in bringing about the mischief.¹

2. The reason why every one of the co-operating persons is not required to pay each the entire damage in full is simply because the person suffering has no merit entitling him to demand more than a single compensation. If the proceeding against the wrong-doers were criminal, the State being plaintiff, each defendant would be compelled thus to make good the entire damage.² In like manner, —

3. Where the plaintiff's negligence or other wrong has contributed to the injury for which he seeks compensation of the defendant, — the defendant not having done the wrong in full, but the two having done it by mutual contribution, — the principle above stated would require the defendant to pay, and to pay the whole. And the reason why the law does not compel it, in pursuance of such principle, is, that the courts, being established to enforce the law, not to aid plaintiffs in breaking it, will not take jurisdiction of a claim into which the applicant's own law-breaking has entered, constituting thereof any part.³ But, —

¹ Ante, § 518, 522, 527, and the places there referred to.

² Ante, § 519, 520.

³ Ante, § 54–64, 459, 460, and see subsequent sections.

4. For the wrong of the plaintiff to have this effect, it must be of the criminal or consciously evil quality;¹ so that, applying this principle to our present elucidations, the contributory negligence of a plaintiff too young or otherwise too feeble in mind to exercise carefulness is no answer to a suit for the defendant's negligence.² Now,—

§ 574. *Order of Subject.*— Bearing in mind these principles, and looking for such others as may appear applicable, we shall consider this subject as to, First, Inevitable accidents; Secondly, The negligence of the parent or person in care of the child, the suit being by the parent; Thirdly, The same when the child sues; Fourthly, The child's contributory negligence; Fifthly, The negligence of the person from whom the injury proceeds.

§ 575. *First. Inevitable Accidents:*—

No Negligence.— When, though there is injury, there is no negligence or other wrong in the party from whom the injury proceeds, there can be no contributory negligence in the other party. For if there is negligence in the latter, it is not contributory, there being nothing to which it can contribute. The case is one of overwhelming necessity, or it is a common accident of life, or it is otherwise within the same principle; and the sufferer must bear his misfortune without compensation, as explained in a preceding chapter.³ For example,—

§ 576. *Illustrations.*— If a bridge company builds properly, its bridge having a good footway and a good carriage-way, and a child too young to exercise carefulness walks, not on either, but on a gaspipe placed some distance above the floor, there is neither negligence in the one party nor contributory negligence in the other, and if the child is injured there is no remedy.⁴ So if a child goes uninvited and unenticed upon manufacturing premises, and falls into a pool of hot water, the injury to it is without redress.⁵ Again, if a child in the street, after the forward wheel of a horse-car has passed, puts

¹ Ante, § 56, 535; Bishop Con. § 481-486.

³ Ante, § 155-185.

² Lynch v. Nurdin, 1 Q. B. 29; Powell v. Deveney, 3 Cush. 300, 305; Evansich v. Gulf, &c. Ry. 57 Texas, 126.

⁴ Oil City, &c. Bridge v. Jackson, 4 Am. Pa. 321.

⁵ Schmidt v. Kansas City Dist. Co. 90 Mo. 284.

itself before the hind wheel, which the driver's other duties do not permit him to look to, and is injured, no suit can be maintained.¹ In these, and other like cases,² whether there was negligence on the side of the injured child³ or not, there being none on the other side, the accident belongs to the inevitable class for which no action can be maintained.⁴

§ 577. Secondly. *The Negligence of the Parent or Person in Care of the Child, the Suit being by the Parent*:—

Parent's Own.—When the parent himself brings the suit,⁵ he will not be permitted to recover if his own negligence in the care of the child contributed to the injury.⁶ And,—

§ 578. **Other Person in Care.**—If the parent has intrusted the child to the care of another person, the ordinary principles of the law of agency would render him responsible for such person's neglects. Still, applying now the reasoning of the law, and assuming him to be thus responsible, if he was not negligent in selecting the person, such person's negligence, however gross, would not be the sort of contributory negligence which would bar the parent's suit; because, as to the parent, it was not "of the criminal or consciously evil quality," within a rule stated in a previous section.⁷ But the intrusting of the child to incompetent or otherwise improper custody would be such an evil negligence as, if it contributed to the injury, would bar the parent's suit. This view of the question appears to accord with the better adjudications, though the form of the reasoning may not be quite so in all of them; or, if we look at the cases simply, and do not ex-

¹ *Bulger v. Albany Ry.* 42 N. Y. 459.

² *Miles v. Atlantic, &c. Rld.* 4 Hughes, 172; *Chicago, &c. Rld. v. Lammert*, 12 Bradw. 408; *Farris v. Cass Ave. &c. Ry.* 80 Mo. 325; *Chicago, &c. Rld. v. Becker*, 76 Ill. 25; *Montfort v. Schmidt*, 36 La. An. 750.

³ *Chester v. Porter*, 47 Ill. 66; *Rudd v. Richmond, &c. Rld.* 80 Va. 546; *Chicago, &c. Ry. v. Smith*, 46 Mich. 504; *Murray v. Richmond, &c. Rld.* 93 N. C. 92.

⁴ *Hartfield v. Roper*, 21 Wend. 615;

Callahan v. Bean, 9 Allen, 401; *Kreig v. Wells*, 1 E. D. Smith, 74; *The Burgundia*, 29 Fed. Rep. 464; *Hussey v. Ryan*, 64 Md. 426.

⁵ Ante, § 553-559.

⁶ *Baltimore, &c. Rld. v. The State*, 30 Md. 47; *Evansville, &c. Rld. v. Wolf*, 59 Ind. 89; *St. Louis, &c. Ry. v. Freeman*, 36 Ark. 41; *Nagel v. Missouri Pac. Ry.* 75 Mo. 653; *Williams v. Texas, &c. Ry.* 60 Texas, 205.

⁷ Ante, § 578, proposition 4. And see post, § 631-634.

amine further into the law as a system of reasoning, some doubts or confusion of doctrine may appear. And there are judicial opinions which seem to hold the custodian's negligence absolutely contributory.¹

§ 579. *Instances*, — illustrative of what is set down in the last two sections, might be multiplied indefinitely. There is a difference between permitting a child to do a negligent thing, and its doing the thing voluntarily at a moment when the parent's eye is not upon it. To permit one under three years of age to wander unattended nine hundred feet from home near a railroad, followed by injury, has been well held to be contributory negligence in the parent.² *A fortiori* it is such to suffer one under five to be alone on a railroad track, where cars are hourly passing.³ Yet the parent, especially if a poor laborer,⁴ cannot be constantly watching the child, so that its escape to a place of danger is not necessarily the parent's contributory negligence.⁵ In the absence of unusual danger, it is not negligence to allow an ordinarily intelligent and active child of between ten and eleven years to be in the street.⁶ In these and various other like cases,⁷ distinctly and widely on one side or the other of the line distinguishing negligence from adequate carefulness, it may be competent for the court to say, as of law, what is the effect of the few conceded facts.⁸

But —

¹ *Walters v. Chicago, &c. Rld.* 41 Iowa, 71; *Schmidt v. Milwaukee, &c. Ry.* 23 Wis. 186; *O'Flaherty v. Union Ry.* 45 Mo. 70; *Waite v. North Eastern Ry.* Ellis, B. & E. 719, 726, 727, commented on in *The Bernina*, 12 P. D. 58; *Stock v. Wood*, 136 Mass. 353; *Ohio, &c. Ry. v. Stratton*, 78 Ill. 88, 91; *Ihl v. Forty-second St. &c. Rld.* 47 N. Y. 317; *Collins v. South Boston Rld.* 142 Mass. 301; *Reed v. Minneapolis St. Ry.* 34 Minn. 557; *Stafford v. Rubens*, 115 Ill. 196; *Hoppe v. Chicago, &c. Ry.* 61 Wis. 357; *Chicago, &c. Rld. v. Becker*, 84 Ill. 483; *St. Louis, &c. Ry. v. Freeman*, 36 Ark. 41; *Nagel v. Missouri Pac. Ry.* 75 Mo. 653.

² *Evansville, &c. Rld. v. Wolf*, 59 Ind. 89. And see *St. Louis, &c. Ry. v. Freeman*, 36 Ark. 41.

³ *Jeffersonville, &c. Rld. v. Bowen*, 40 Ind. 545; *Cauley v. Pittsburgh, &c. Ry.* 14 Norris, Pa. 398.

⁴ *Chicago, &c. Rld. v. Gregory*, 58 Ill. 226.

⁵ *Chicago v. Hesing*, 83 Ill. 204; *Frick v. St. Louis, &c. Ry.* 75 Mo. 542.

⁶ *Karr v. Parks*, 40 Cal. 188.

⁷ *Chicago, &c. Rld., v. Becker*, 84 Ill. 483; *Bronson v. Southbury*, 37 Conn. 199; *Reed v. Minneapolis St. Ry.* 34 Minn. 557.

⁸ *Ante*, § 442; *Stock v. Wood*, 136 Mass. 353; *Wright v. Malden, &c. Rld.* 4 Allen, 283.

§ 580. **Question for Jury.**—The larger number of these infancy cases present complicated or uncertain facts, or evidence requiring to be weighed; for which, or for other reasons, they are within the rules¹ rendering their submission to the jury obligatory on the court.² Thus, it has been held to be a question for the jury whether a father is negligent in permitting a boy of twelve to drive a team in the night.³ And, not in conflict with the case stated in the last section, the particular circumstances may require a submission to the jury of the question whether or not a parent is negligent in suffering his child to be in the street,⁴ or to go upon a railroad track.⁵ And the case of a child's escape from the parent may be of the like sort.⁶

§ 581. **Thirdly.** *The Negligence of the Parent or Person in Care of the Child, the Suit being by the Child:*—

Imputed Negligence.—There is a doctrine prevailing in a part of our States, — possibly also in England,⁷ but the question is

¹ Ante, § 442, 469.

² Philadelphia, &c. Rld. v. Long, 25 Smith, Pa. 257; Nagel v. Missouri Pac. Ry. 75 Mo. 653; Fink v. Missouri Furnace, 10 Mo. Ap. 61; Stafford v. Rubens, 115 Ill. 196; Collins v. South Boston Rld. 142 Mass. 301.

³ Parish v. Eden, 62 Wis. 272.

⁴ Schierhold v. North Beach, &c. Rld. 40 Cal. 447.

⁵ Payne v. Humeston, &c. Ry. 70 Iowa, 584; Ihl v. Forty-second St. &c. Rld. 47 N. Y. 317.

⁶ Pittsburg, &c. Ry. v. Pearson, 22 Smith, Pa. 169; Gibbons v. Williams, 135 Mass. 333; McGearry v. Eastern Rld. 135 Mass. 363; Hoppe v. Chicago, &c. Ry. 61 Wis. 357.

⁷ Waite v. North Eastern Ry. Ellis, B. & E. 719. In this case, a woman had bought tickets for herself and a five years old boy her grandchild, who was in her care, and by the joint negligence of herself and the defendant road the boy was injured. He sued the road; and it was held by the Court of Queen's Bench and affirmed in the Exchequer Chamber that his grandmoth-

er's contributory negligence barred his claim. The judges did not quite agree upon the ground of the decision. A leading view was that, as the contract of carriage was made with the grandmother, and the boy was in her care, the carrier's undertaking should be construed as conditioned on the grandmother's carefulness. Concerning which view, see ante, § 64 and note. One learned judge said: "There really is no difference between the case of a person of tender years under the care of another and a valuable chattel committed to the care of an individual, or even not committed to such care." p. 733. As to which reasoning, there is nothing in the established law by which to test it; for the law does not recognize the right of a "valuable chattel" to come into court with a suit in its own name. If the owner of it sues, the case may have some analogy to the parent's suing, already explained in the text. Other judges spoke of the "identification" of the boy with his grandmother. In the Massachusetts case of Wright v. Malden, &c. Rld. 4 Allen, 233, 236, Hoar,

there not free from doubt, — to the effect that, where a young child is in the care of an older person, particularly the parent, the negligence of this person shall be imputed to him, as his contributory negligence, in his suit ¹ to recover compensation for an injury inflicted by a third person.² The one in whose care he is, it was said in an early case on the subject, “is keeper and agent for this purpose; and, in respect to third persons, his act must be deemed that of the infant, his neglect the infant’s neglect,”³ — reasoning which, we have just had occasion to see, is not sound in law.⁴ On the other hand, —

§ 582. **How in Reason.** — Looking into the reasoning of the

J. expounded the English doctrine and authorities thus: “In such a case it has been held in England that the plaintiff, although bound to show that the negligence of the defendants was the sole cause of the injury, and that his own negligence did not in any particular contribute to it, is still not required to prove any higher degree of care on his own part than could reasonably be expected from such a person. The leading case is *Lynch v. Nurdin*, 1 Q. B. 29; and, although the case was questioned in *Lygo v. Newbold*, 9 Exch. 302, it has generally been followed as an authority. Where the right of the infant to sue is derived from a contract made on his behalf by an adult having charge of him, a different rule has been adopted in the recent case of *Waite v. North Eastern Ry.*” Said Moncure, P. in *Norfolk, &c. Rld. v. Ormsby*, 27 Grat. 455, 476, “We concur in the principle of the case of *Lynch v. Nurdin*, and others of that class; which decide that the neglect of parents and guardians is not imputable to infant children and wards in such cases; and we do not concur in the principle of the case of *Hartfield v. Roper*, 21 Wend. 615, and others of that class, which decide the contrary.”

¹ Ante, § 570, 571.

² *Hartfield v. Roper*, 21 Wend. 615; *Wright v. Malden, &c. Rld.* supra; *Messenger v. Dennie*, 137 Mass. 197;

Morrison v. Erie Ry. 56 N. Y. 302; *Leslie v. Lewiston*, 62 Maine, 468; *Fitzgerald v. St. Paul, &c. Ry.* 29 Minn. 336. In the last case, among others referred to on this side of the question were *Mangam v. Brooklyn Rld.* 38 N. Y. 455; *Brown v. European, &c. Ry.* 58 Maine, 384; *Lafayette, &c. Rld. v. Huffman*, 28 Ind. 287; *Toledo, &c. Ry. v. Grable*, 88 Ill. 441; *Meeks v. Southern Pac. Rld.* 52 Cal. 602.

³ *Hartfield v. Roper*, supra, at p. 619. In another case, the reasoning is expressed thus: “She was under the care of her father, who had the custody of her person, and was responsible for her safety. It was his duty to watch over her, guard her from danger, and provide for her welfare, and it was hers to submit to his government and control. She was entitled to the benefit of his superintendence and protection, and was consequently subject to any disadvantages resulting from the exercise of that parental authority which it was both his right and duty to exert.” *Holly v. Boston Gas-light Co.* 8 Gray, 123, 132. The result of which reasoning is; that, for a girl to obey the law, and submit to her father’s control, doing what every minor ought, is that reprehensible contributory negligence which will require a court to refuse her suit for the redress of a wrong! Ante, § 573.

⁴ Ante, § 578.

law,¹ we discover that it does not sustain this doctrine. The doctrine is a new one, brought forward long after the system of the common law, with its many principles, had become consolidated. And, in this system, unlike some former systems wherein the child was treated substantially as the father's chattel having few or no rights separately its own, the minor, from the first drawing of the infantile breath, is invested with all those rights of an adult which can give him anything, and protected simply by such disabilities as can protect, yet by none which are capable of working him harm. Now, this new doctrine of imputed negligence, whereby the minor loses his suit, not only where he is negligent himself, but where his father, grandmother, or mother's maid is negligent, is as flatly in conflict with the established system of the common law as anything possible to be suggested. The law never took away a child's property because his father was poor or shiftless or a scoundrel, or because anybody who could be made to respond to a suit for damages was a negligent custodian of it. But, by the new doctrine, after a child has suffered damages, which, confessedly, are as much his own as an estate conferred upon him by gift, and which he is entitled to obtain out of any one of several defendants who may have contributed to them, he cannot have them if his father, grandmother, or mother's maid happens to be the one making a contribution. In these and other respects, it is submitted, the established principles stated in a preceding section are conclusive of the proposition that the doctrine now in contemplation does not belong to the common law.² And,—

§ 583. **Better Authorities.** — Though the erroneous doctrine is upheld by courts as respectable as any among us, the contrary and sounder view is sustained by courts not less respectable, as well as by the law's established reasons. To enter upon a count of the States on the respective sides of this question would be to resort to the lowest kind of argumentation ever found in a law book; yet, even from this sort of reasoning, it is believed, the doctrine which refuses

¹ Ante, § 88, 573.

² Ante, § 573.

to impute a parent's sin of negligence to the child would not suffer.¹

§ 584. Fourthly. *The Child's Contributory Negligence*:—

Parent's Suit. ¶ If a parent, himself being free from negligence, brings a suit for expenses and loss of service resulting from an injury to the child,² will the child's contributory negligence, supposing him to be of an age and intelligence rendering him capable of it, be available in defence? * A part of the reasoning of the last few sections would seem to be applicable to this case, leading to a negative answer to the question. Recurring to the doctrines stated further back,³ since the party inflicting the injury has in himself no equity to set up the defence of contributory negligence, and since the plaintiff in the case now supposed was guilty of no conscious or criminal wrong, the misfortune of having a negligent child should not debar him from pursuing his legal claim for damages.⁴ Still it is sometimes taken for granted, without much consideration, that a father in these circumstances cannot recover for the injury; but probably the question is open for further judicial discussion.⁵ This matter oftener arises in the—

§ 585. *Child's Suit.*—When the child sues, having arrived

¹ Among the cases on this side of the question are *Erie City Passenger Ry. v. Schuster*, 3 Am. Pa. 412, 416, 417; *Bellefontaine, &c. Rld. v. Snyder*, 18 Ohio State, 399; *Cleveland, &c. Rld. v. Manson*, 30 Ohio State, 451; *Norfolk, &c. Rld. v. Ormsby*, 27 Grat. 455; *Galveston, &c. Ry. v. Moore*, 59 Texas, 64; *Baltimore, &c. Ry. v. McDonnell*, 43 Md. 534; *Government St. Rld. v. Hanlon*, 53 Ala. 70; *Huff v. Ames*, 16 Neb. 139, 142, 143, in which Reese, J. observes: "We think the weight of authority and the better rule to be, . . . that, in an action by the *infant* for damages resulting from an injury to himself by the negligence or want of care of a third party, the negligence of the parent or guardian is not to be considered or imputed to the infant." Be-

sides some of the above cases, he cites to this proposition *Daley v. Norwich, &c. Rld.* 26 Conn. 591; *North Pennsylvania Rld. v. Mahoney*, 7 Smith, Pa. 187; *Whirley v. Whiteman*, 1 Head, 610, 620. "But," he adds, "when the parent sues for loss of services sustained by an injury to the child, then the contributory negligence of the parent may be a bar." Referring to *Glassey v. Hestonville, &c. Ry.* 7 Smith, Pa. 172; *Louisville, &c. Canal v. Murphy*, 9 Bush, 522.

² Ante, § 577-580.

³ Ante, § 573.

⁴ And see post, § 631-634.

⁵ *Dietrich v. Baltimore, &c. Ry.* 58 Md. 347; *Bronson v. Southbury*, 37 Conn. 199; *Honegsberger v. Second Ave. Rld.* 2 Abb. Ap. 378; *Baltimore, &c. Rld. v. The State*, 30 Md. 47.

at years and understanding rendering him capable of contributory negligence, it will bar him if it exists in sufficient degree. As to which,—

§ 586. **The Rule** — is, that, in early infancy, and onward to a period not made definite by adjudications,¹ but depending upon the particular case, with its circumstances, and the intelligence of the individual child, the child is in law incapable of contributory negligence.² Thus, children of eighteen months,³ of two years,⁴ of two years and ten months,⁵ of four years,⁶ under five years,⁷ of five years,⁸ of six years,⁹ under seven,¹⁰ even of seven years,¹¹ have been deemed, either generally or under the special facts, thus incapable. Still, in most of the litigated cases, the question of capacity is passed upon by the jury, being within the principles requiring it,¹² and the ages just stated are not absolute.¹³ The remainder of the rule is, that the minor of whatever age is required to exercise the care which, under the circumstances, is reasonably to be expected of one of his particular years and capacity, a lack

¹ *Houston, &c. Ry. v. Simpson*, 60 Texas, 103.

² *Railroad v. Stout*, 17 Wal. 657; *Walters v. Chicago, &c. Rld.* 41 Iowa, 71; *Thurber v. Harlem Bridge, &c. Rld.* 60 N. Y. 326.

³ *Schmidt v. Milwaukee, &c. Ry.* 23 Wis. 186.

⁴ *Frick v. St. Louis, &c. Ry.* 75 Mo. 595.

⁵ *Norfolk, &c. Rld. v. Ormsby*, 27 Grat. 455; *Keyser v. Chicago, &c. Ry.* 56 Mich. 559.

⁶ *North Penn. Rld. v. Mahoney*, 7 Smith, Pa. 187.

⁷ *Chicago, &c. Rld. v. Gregory*, 58 Ill. 226.

⁸ *McGarry v. Loomis*, 63 N. Y. 104.

⁹ *Bay Shore Rld. v. Harris*, 67 Ala. 6; *Chicago, &c. Rld. v. Becker*, 84 Ill. 483; *Central Trust Co. v. Wabash, &c. Ry.* 31 Fed. Rep. 246; *Johnson v. Chicago, &c. Ry.* 56 Wis. 274; *Philadelphia, &c. Rld. v. Laver*, 2 Am. Pa. 414. See *Baltimore, &c. Rld. v. Schwindling*, 5 Out. Pa. 258.

¹⁰ *Lynch v. Nurdin*, 1 Q. B. 29.

¹¹ *Chicago, &c. Rld. v. Welsh*, 118 Ill. 572; *Evansich v. Gulf, &c. Ry.* 57 Texas, 126; *Meibus v. Dodge*, 38 Wis. 300. See *Cassida v. Oregon Ry. &c. Co.* 14 Oregon, 551. A boy of eight has been held guilty of contributory negligence. *Messenger v. Dennie*, 141 Mass. 335.

¹² *Ante*, § 442, 469, 580.

¹³ *Thurber v. Harlem Bridge, &c. Rld.* supra; *Ryder v. New York*, 50 N. Y. Super. 220; *Moebus v. Hermann*, 38 Hun, 370; *McMahon v. Northern Cent. Ry.* 39 Md. 438; *Kunz v. Troy*, 104 N. Y. 344; *Lane v. Atlantic Works*, 111 Mass. 136; *Jones v. Utica, &c. Rld.* 36 Hun, 115; *O'Connor v. Boston, &c. Rld.* 135 Mass. 352; *Barry v. New York Cent. &c. Rld.* 92 N. Y. 289; *Kline v. Central Pac. Rld.* 37 Cal. 400, 404; *Costello v. Syracuse, &c. Rld.* 65 Barb. 92; *Wyatt v. Citizens Ry.* 55 Mo. 485; *Norton v. Ittner*, 56 Mo. 351; *Dahl v. Milwaukee City Ry.* 65 Wis. 371.

whereof is, if contributory to the injury he complains of, the barring contributory negligence.¹ Still, —

§ 587. **Capable Infants.** — After an age and under circumstances not definable by rule, the court can see that the infant is capable of contributory negligence, and it will not suffer the jury to ignore this fact.² Thus, as once judicially observed, “a boy eleven years of age knows, as well as an adult does, what a railroad is, and the use to which it is put, and the consequence to a person who should be struck by a passing train, and knows that he should not stop to play or lounge amid a network of tracks.” On this the jury is required to act, yet not to presume also that such a boy has “the judgment of an adult.”³

§ 588. **Fifthly. *The Negligence of the Person from whom the Injury Proceeds:*** —

No Negligence. — The simple fact that an infant, however young, has been injured by another person does not cast liability on the latter.⁴ It must further appear that the latter was guilty of negligence or some other wrong in violation of a duty to the infant,⁵ and that the injury proceeded therefrom.⁶ Otherwise, whether the complaining infant or parent was negligent or not, his suit must fail.⁷ Now, —

¹ Railroad v. Gladmon, 15 Wal. 401, 408; Railroad v. Stout, 17 Wal. 657; Chicago, &c. Rld. v. Murray, 71 Ill. 601; Government St. Rld. v. Hanlon, 53 Ala. 70; Baltimore, &c. Ry. v. McDonnell, 43 Md. 534; Moynihan v. Whidden, 143 Mass. 287; Philadelphia, &c. Ry. v. Hassard, 25 Smith, Pa. 367; Elkins v. Boston, &c. Rld. 115 Mass. 190, 200; St. Louis, &c. Ry. v. Valerius, 56 Ind. 511; Rockford, &c. Rld. v. Delaney, 82 Ill. 198; McMillan v. Burlington, &c. Rld. 46 Iowa, 231; Glover v. Gray, 9 Bradw. 329; Plumley v. Birge, 124 Mass. 57; Snow v. Provincetown, 120 Mass. 580; Thurber v. Harlem Bridge, &c. Rld. 60 N. Y. 326; Maher v. Central Park, &c. Rld. 67 N. Y. 52; Kerr v. Forgue, 54 Ill. 482; Lynch v. Smith, 104 Mass. 52.

² Chicago, &c. Ry. v. Kininger, 114

Ill. 79; Solomon v. Central Park, &c. Rld. 1 Sweeny, 298; Martin v. Cahill, 39 Hun, 445; McPhillips v. New York, &c. Rld. 12 Daly, 365; Honor v. Albrighton, 12 Norris, Pa. 475; Beckham v. Hillier, 18 Vroom, 12; Brown v. European, &c. Ry. 58 Maine, 384; Moore v. Pennsylvania Rld. 3 Out. Pa. 301.

³ Masser v. Chicago, &c. Ry. 68 Iowa, 602, 605, opinion by Adams, C. J. And see Dowling v. Allen, 88 Mo. 293.

⁴ Ante, § 575.

⁵ Nolan v. New York, &c. Rld. 53 Conn. 461; Cauley v. Pittsburgh, &c. Ry. 2 Out. Pa. 498.

⁶ Ante, § 37-39.

⁷ Stock v. Wood, 136 Mass. 353; Chrystal v. Troy, &c. Rld. 105 N. Y. 164; The case of Wendell v. New York Cent. &c. Rld. 91 N. Y. 420, and see

§ 589. **Duty to Infants and Adults compared.**—The plain proposition of reason, that the duties which men owe to others are made greater by their greater needs, is a part of the law of our present subject. The new born babe demands, and from people of ordinary humanity receives, a degree of carefulness and attention which would not be bestowed on an older child, and the older has more than would be given a grown up and well man. Thus,—

§ 590. **Railroad Trains.**—It would be impossible to conduct the business of a railroad if along its entire track little children were playing or sleeping, and the train hands were obliged to walk in advance of the cars and remove them. At the same time, those running a train should keep a proper lookout; and, if they discover on the track a child too young to take care of itself, they are not justified in presuming, as ordinarily in the case of an older person, that the child will step aside and avoid injury. They must, therefore, employ every possible means to stop the train; in default of which, and in the absence of contributory negligence on the part of the person suing, the road will be liable for the harm following.¹

§ 591. *The Doctrine of this Chapter restated.*

A child, not having arrived at the full age of twenty-one, is under the government and protection of his father. If the father is dead, or incompetent, or if he emancipates the child,

p. 424, 425, which went off on a question of contributory negligence, appears to be a specimen case out of a considerable number in the books, wherein counsel have overlooked the simple proposition of the text, under a sort of assumption that, if the defendant injured the child, he was of course liable in the absence of contributory negligence.

¹ Meeks v. Southern Pac. Rld. 56 Cal. 513; Ex parte Stell, 4 Hughes, 157; Chrystal v. Troy, &c. Rld. 105 N. Y. 164; Little Rock, &c. Ry. v.

Barker, 39 Ark. 491, 503; Gallaher v. Crescent City Rld. 37 La. An. 288; Schwier v. New York Cent. &c. Rld. 90 N. Y. 558; Jamison v. Illinois Cent. Rld. 63 Missis. 33; Nolan v. New York, &c. Rld. 53 Conn. 461; Cauley v. Pittsburgh, &c. Ry. 14 Norris, Pa. 398; Evansville, &c. Rld. v. Wolf, 59 Ind. 89; St. Louis, Iron Mount. &c. Ry. v. Freeman, 36 Ark. 41; Jeffersonville, &c. Rld. v. Bowen, 40 Ind. 545; Hicks v. Pacific Rld. 65 Mo. 34.

some of his rights and duties will under various circumstances pass to another. He may make the child, like any other person, his agent; but, not doing this, he is not liable to a third person for the child's torts. But the child is liable for his own torts, if of a sort which it is competent for one of his mental capacity to commit. (If the parent suffers from a tort inflicted on the child by a third person, he may have his action against the latter for the damages. And whether the parent has this right or not, or whether he pursues his just claim or not, the child has his action against the wrong-doer for the harm to himself. (The child, in his suit, cannot recover the parent's damages; nor can the parent, in his suit, recover the child's. In cases of injuries from negligence, there are some differences of opinion; but, by the better doctrine, the parent's contributory negligence does not cut off the child's claim for an injury, nor does the child's the parent's.)The child, in proportion to its tender years and dependent condition, is entitled to carefulness and consideration from persons coming in contact with it; so that what would be abundant carefulness toward an adult may be negligence toward a child. But even a child, however young and dependent, if the victim of an accident, can have no compensation from the person doing the injury, unless negligence or some other wrong in such person appears, and the injury proceeded therefrom.

CHAPTER XXX.

TEACHER AND PUPIL.

§ 592. **Nature of Relation.**—The relation of teacher and pupil is much narrower than that of parent and child. It varies also with the purposes of the school and with the age of the pupil. The proprietor or principal of a boarding school for young children stands, in many respects, *in loco parentis* to the children. But the president of a university, established for the instruction of maturer youths in the higher learning, is not, though they are also provided with board at the institution, in exactly the same sense and degree *in loco parentis* to them. The teacher of a common public school, to which pupils go daily for instruction in rudimental learning, sustains to them a relation not exactly the same as that of the president or of the principal just supposed. Now,—

§ 593. **Rules for School.**—It is competent for the proper authority to establish reasonable and just rules to regulate a school. In our common schools, for example, the school board or other like supervisors may, at least in some of the States, make them; and, whether they do or not, the teacher may lay down rules not conflicting with those provided by superior authority.¹ A rule or command not within the jurisdiction of the teacher, or of the board making the rule, is not obligatory upon the pupil; as, for example, it was held in Wisconsin that a scholar cannot be suspended from a public school for refusing to comply with a regulation requiring each one to bring into the school-room a stick of wood for the fire.²

¹ *Deskins v. Gose*, 85 Mo. 485; ² *The State v. Fond du Lac Education Board*, 63 Wis. 234.
Sheehan v. Sturges, 53 Conn. 481; *The State v. Webber*, 108 Ind. 31.

§ 594. **Jurisdiction over Pupil.** — Under our common-school system, the jurisdiction of the teacher or supervising board is, to a degree not definable and probably differing in the States, superior to the parent's, within the school-room, even as to the particular studies he shall pursue. Thus, by the Indiana statute, "The common schools of the State shall be taught in the English language; and the trustees shall provide to have taught in them orthography, reading, writing, arithmetic, geography, English grammar, physiology, history of the United States, and good behavior, and such other branches of learning and other languages as the advancement of pupils may require and the trustees from time to time direct." And it was held that a rule requiring the pupils in a high school to provide themselves with a certain music book, and study and practise music at stated times, could be enforced by the suspension of a pupil refusing, though the father objected, and deemed the study of music not to be for the interest of the child.¹ There can be no doubt that, in the absence of a constitutional inhibition,² it is competent for the

¹ *The State v. Webber*, 108 Ind. 31. At p. 38, 39, Howk, C. J. states the reasoning and the authorities, as follows: "The important question arises, which should govern the public high school of the city of Laporte, as to the branches of learning to be taught and the course of instruction therein, the school trustees of such city, to whom the law has confided the direction of these matters, or the mere arbitrary will of the relator, without cause or reason in its support? We are of opinion that only one answer can or ought to be given to this question; the arbitrary wishes of the relator, in the premises, must yield and be subordinated to the governing authorities of the school city of Laporte, and their reasonable rules and regulations for the government of the pupils of its high school. This is the doctrine of the cases decided by the courts of last resort in many of our sister States; and, as applicable to the facts of this case, we think it is the

better doctrine. *Roberts v. Boston*, 5 Cush. 198; *Hodgkins v. Rockport*, 105 Mass. 475; *Ferriter v. Tyler*, 48 Vt. 444; *Sewell v. Defiance Un. Sch.* 29 Ohio State, 89; *Donahoe v. Richards*, 38 Maine, 379; *Guernsey v. Pitkin*, 32 Vt. 224; *Kidder v. Chellis*, 59 N. H. 473. On the other hand, it is not to be denied that the decisions of the Supreme Courts of Illinois and Wisconsin are in apparent conflict, to some extent at least, with what we here decide. *Morrow v. Wood*, 35 Wis. 59; *Rulison v. Post*, 79 Ill. 567; *Trustees, &c. v. People*, 87 Ill. 303. There is much in the opinions of those learned courts which, applied to the cases before them, meets our approval; but we think that the doctrine of those cases cannot apply, and ought not to be applied, to the case in hand as stated by the relator, in his verified complaint herein, to which case we limit this opinion."

² *Ante*, § 91-96; *Moore v. Monroe*, 64 Iowa, 367.

legislature establishing a common-school system to direct what studies shall be pursued in the schools, and exclude the children of parents who refuse. But the right of a parent,¹ especially where a child arrived at years to judge for himself concurs, to reject a particular study not of universal use, like music, is of so high and sacred a nature as to render any legislative attempt to take it away unfortunate. The time which most children can devote to educational purposes is extremely brief in comparison with what is to be learned. Many a child could acquire no useful knowledge of music during his entire minority, if every wakeful moment was devoted to it, and to compel such a throwing away of valuable time is a tyranny which ought not to be possible in any free country. Further, —

§ 595. *Outside the School-room.* — It is not competent for the teacher of a public school to regulate the conduct of the pupil while at home, under the direct eye of the parent.² But truancy may be prohibited;³ and the children may be forbidden under pain of punishment to quarrel and swear on their way home.⁴ "Truancy," said Norton, J., "is an act committed out of the school-room, but being subversive of the good order and discipline of the school, may subject the scholar to suspension or expulsion. If the effect of acts done out of the school-room while the pupils are returning to their homes, and before parental control is resumed, reach within the school-room, and are detrimental to good order and the

¹ The State v. Mizner, 50 Iowa, 145.

² 1 Bishop Crim. Law, § 886; Dritt v. Snodgrass, 66 Mo. 286; Deskins v. Gose, 85 Mo. 485. Still it was observed by Willson, J. in Bolding v. The State, 23 Texas Ap. 172, 175, that "the authority of a teacher over his pupils is not, in our opinion, necessarily limited to the time when the pupils are at the schoolroom, or under the actual control of the teacher. Such authority extends, we think, to the prescribing and enforcement of reasonable rules and requirements even while the pupils are at their homes." As to

conduct at home, and in the presence of the parent, it is not probable the learned judge here intended to maintain that the teacher can compel the child to do what the parent forbids, or refrain from what the parent commands. But, the parent concurring, it is not unreasonable that the teacher should exercise some control over the child at home in relation to things pertaining to school duties.

³ King v. Jefferson City School Board, 71 Mo. 628.

⁴ Deskins v. Gose, 85 Mo. 485.

best interests of the school, no good reason is perceived why such acts may not be forbidden, and punishment inflicted on those who commit them."¹ In reason, there is a margin of co-jurisdiction between teacher and parent.

§ 596. **Enforcement of Obedience.**—The teacher has the power to enforce obedience to the rules and to his commands.² One of the means recognized by the law is corporal chastisement.³ He may thereby inflict temporary pain, but not "seriously endanger life, limbs, or health, or disfigure the child, or cause any other permanent injury."⁴ He cannot lawfully beat the child even moderately to gratify his own evil passions;⁵ the chastisement must be honestly inflicted in punishment for some dereliction which the pupil understands.⁶ Plainly, if the teacher keeps himself within these limits and his lawful jurisdiction, he must decide the question of the expediency or necessity of the punishment and its degree; it is impossible he should ever inflict it without. And, in reason, if he proceeds honestly and with due caution, acting thus in a semi-judicial capacity, he should not be made to suffer though a court or jury should afterward deem that he imposed on the pupil a heavier burden of pain than necessary. Still the rule is commonly stated to be that a flogging must be reasonable and moderate according to the requirements of the case and the gravity of the offence. And herein, to an extent not well defined, it seems to be assumed that it is competent for the jury to overrule the teacher's judgment on a clear showing by proofs.⁷

¹ In *Deskins v. Gose*, supra, at p. 488.

² "The acquiring of learning is not the only object of our public schools. To become good citizens, children must be taught self-restraint, obedience, and other civic virtues." *Emery, J. in Patterson v. Nutter*, 78 Maine, 509, 511.

³ 1 Bishop *Crim. Law*, § 886; *Fitzgerald v. Northcote*, 4 *Fost. & F.* 656.

⁴ *The State v. Pendergrass*, 2 Dev. & Bat. 365.

⁵ *Bolding v. The State*, 23 Texas Ap. 172, 175.

⁶ *The State v. Mizner*, 50 Iowa, 145.

⁷ 1 Bishop *Crim. Law*, § 886; *Dowlen v. The State*, 14 Texas Ap. 61; *Danenholfer v. The State*, 79 Ind. 75; *Sheehan v. Sturges*, 53 Conn. 481; *Patterson v. Nutter*, 78 Maine, 509; *Commonwealth v. Randall*, 4 Gray, 36; *Vanvactor v. The State*, 113 Ind. 276.

§ 597. *The Doctrine of this Chapter restated.*

Within the purposes and scope of a school over which a teacher presides, he stands in a semi-paternal relation to his pupils. By formal rule or by specific command, and subject to any authority superior to his, he may regulate their conduct in school, and out of school so far as it affects the discipline and studies within. And he may enforce obedience by expulsion, by chastisement, or by other proper means.

CHAPTER XXXI.

MASTER AND SERVANT.

§ 598. Introduction.

599-601. In General of Relationship.

602-607. Servant and Contractor distinguished.

608-616. When Master liable for Servant's Torts.

617-621. Servant's Negligence combined with Contributory.

622-630. Servant's Liability for Own Torts.

631-634. One's own Servant's Contributory Negligence.

635. Doctrine of Chapter restated.

§ 598. **How Chapter divided.** — We shall consider, I. In General of the Relationship; II. The Servant and Contractor distinguished; III. In what Circumstances the Master is liable to Third Persons for the Torts of his Servant; IV. The Servant's Negligence causing or combining with the Contributory Negligence of an Injured Third Person; V. The Liability of the Servant for his own Torts committed in the Service; VI. One's own Servant's Contributory Negligence.

I. In General of the Relationship.

§ 599. **What.** — The terms "master" and "servant" are correlates, so that there cannot be a master without a servant or a servant without a master.¹ And the relation is constituted whenever one takes another into his actual service, either generally or for the particular occasion or thing, the former having by law or by agreement or tacit consent the right to command, and the latter being under a corresponding duty to obey.² For some purposes, — as, to found an action

¹ 2 Bishop Crim. Law, § 333-336. 570; Cobb v. Abbot, 14 Pick. 289;

² Sadler v. Henlock, 4 Ellis & B. De Voin v. Michigan Lumber Co. 64

for seduction,¹— one who has the mere right to the services may claim as master ; but commonly — as, where it is sought to charge a father with the torts of his child²— the relation exists only if there is an actual service or authorization. Moreover,—

§ 600. **Relationship by Estoppel.** — For the purpose of charging the master with a wrong committed by the servant, it is not necessary that the latter should be a servant in fact, he may be such only by estoppel. Thus, if one tells another to whom he is under a duty of fair dealing, that a third person named is his servant, and the other acts on the representation and receives an injury from this third person,³ the first is responsible as though the relationship existed in fact.⁴ Nor need the representation be in words ; as, if the owner of a building, for use in the erection whereof the builder has taken bricks by trespass from a third person, pays for them and neglects to prevent a repetition of the trespass, he is liable also for the builder's further trespass of the same sort.⁵

§ 601. **Exceeding Authority.** — On this principle of estoppel, the master is under various circumstances responsible for what his servant does in excess of his authority or proper functions. But the particulars will be better given under our third sub-title.

II. *The Servant and Contractor distinguished.*

§ 602. **Contractor whether Servant — Consequences.** — Since, to constitute the relation of master and servant, the volitions of the latter must be presumptively or in fact controlled by the former, a contractor, who simply undertakes to bring

Wis. 616 ; Forsyth v. Hooper, 11 Allen, 169 ; Robinson v. Webb, 11 Bush, 419 ; Woodward v. Washburn, 3 Denio, 464.

369 ; Lipe v. Eisenlerd, 32 N. Y. 229 ; Quarman v. Burnett, 6 M. & W. 499 ;

Rapson v. Cubitt, 9 M. & W. 710 ;

Jones v. Liverpool, 14 Q. B. D. 890 ;

Metz v. Buffalo, &c. Rld. 58 N. Y. 61,

66 ; Edwards v. Jones, 12 Daly, 415 ;

Preston v. Knight, 120 Mass. 5 ; Mc-

Cullough v. Shoneman, 9 Out. Pa.

¹ Ante, § 384 ; Clark v. Fitch, 2 Wend. 459.

² Ante, § 549-551.

³ Bishop Con. § 284.

⁴ Growcock v. Hall, 82 Ind. 202.

⁵ Dawson v. Powell, 9 Bush, 663.

And see Rich v. Crandall, 142 Mass.

117 ; Bishop v. Williamson, 2 Fairf. 495.

about a result after his own methods, is not a servant.¹ But one is such who, though he is to have a stipulated price for a thing, executes it under the direction and superintendence of the employer.² So that, in the former case, the employer is not liable to third persons injured through the negligence of the contractor; in the latter, he is.³ To illustrate,—

§ 603. **Instances.** — One who has a public carman transport goods for him is not the carman's master, therefore is not liable for his torts in the service.⁴ A school district contracted with a person to drill a well; by his negligently leaving his tools unguarded a child was injured, yet the school district was held not liable for the damage.⁵ If a railroad company lets out the building of its track to a contractor, it is not responsible for accidents resulting from the sort of machinery used;⁶ or, if the contractor is to employ the road's rolling stock, it is not answerable for the negligence of the persons running it.⁷ On the other hand, where one agreed to take down another's building under the latter's direction and subject to his approval, the former was held liable to a third person for injuries suffered from the negligent doing of the work.⁸ Still,—

§ 604. **Liability from Thing done.** — Though one procures a thing to be done through an independent contractor, if the thing itself or the agreed method of doing it works injury to a third person, the former may be compelled to pay;⁹ not, on

¹ *Fink v. Missouri Furnace*, 82 Mo. 276; *Carter v. Berlin Mills*, 58 N. H. 52; *Edmundson v. Pittsburgh, &c. Rld.* 1 Am. Pa. 316; *The Wm. F. Babcock*, 31 Fed. Rep. 418; *Peachey v. Rowland*, 13 C. B. 182; *Bennett v. Truebody*, 66 Cal. 509; *King v. New York Cent. &c. Rld.* 66 N. Y. 181.

² *Linnehan v. Rollins*, 137 Mass. 123; *New Orleans, &c. Rld. v. Hanning*, 15 Wal. 649; *Andrews v. Boedecker*, 17 Bradw. 213.

³ *Kepperly v. Ramsden*, 83 Ill. 354; *Barrett v. Singer Manuf. Co.* 1 Sweeny, 545; *Kansas, &c. Ry. v. Fitzsimmons*, 18 Kan. 34; *Hale v. Johnson*, 80 Ill. 185; *King v. New York Cent. &c. Rld.*

66 N. Y. 181; *Wray v. Evans*, 30 Smith, Pa. 102; *Slater v. Mersereau*, 64 N. Y. 138; *Reed v. Allegheny City*, 29 Smith, Pa. 300; *Fuller v. Citizens Nat. Bank*, 15 Fed. Rep. 875.

⁴ *McMullen v. Hoyt*, 2 Daly, 271.

⁵ *Wood v. Independent School Dist.* 44 Iowa, 27.

⁶ *Chicago City Ry. v. Hennessy*, 16 Bradw. 153.

⁷ *Hitte v. Republican Valley Rld.* 19 Neb. 620.

⁸ *Linnehan v. Rollins*, 137 Mass. 123.

⁹ *Ellis v. Sheffield Gas Con. Co.* 2 Ellis & B. 767; *Carman v. Steubenville, &c. Rld.* 4 Ohio State, 399, 418; *Palmer v. Lincoln*, 5 Neb. 136; *Sturges*

the ground that the latter is his servant, for he is not, but because the procurer of a tort is answerable as doer.¹ Thus, a railroad bargained with one to clear away a quantity of solid rock, "which," the contract specified, "must be removed by blasting." The work was carefully done, yet a third person was injured, and the railroad, having procured it, was held to be answerable for the damages jointly with the contracting doer.² Again, —

§ 605. **Obstructing Public Way.** — If one contracts with another to do what results in obstructing a street, whereby a person is injured, it will be no answer to this person's claim for damages from the former, that the thing was done under contract.³ And where a municipal corporation is under the duty to keep the public ways in repair, this duty is just as much broken if their want of repair is caused by the acts of one proceeding under contract as by anything else, and the municipality must answer in damages to a person injured by the neglect.⁴ In these illustrations, the ill condition of the way was a nuisance; and, —

§ 606. **Other Nuisances.** — Whatever be the nature of the nuisance, one under a duty to avoid it — as, for example, a nuisance on one's land — is responsible for the injury it does to a third person, though it was erected by a contractor conformably to the terms of his contract. Here, again, the procurer is liable as doer.⁵ But for mere negligent acts in executing the work the contractor alone is answerable; for he who caused the work to be done did not thereby either direct or approve such acts. Yet he will be liable if, in violation of his duty of carefulness, he contracted with an incompetent person.⁶ For example, if one to clear his land employs an-

v. Theological Education Soc. 130 Mass. 414, 415.

¹ Ante, § 522, 524.

² *Carman v. Steubenville, &c. Rld.* supra.

³ *Darmstaetter v. Moynahan*, 27 Mich. 188. And see *Vogel v. New York*, 92 N. Y. 10.

⁴ *Butler v. Bangor*, 67 Maine, 385; *Circleville v. Neuding*, 41 Ohio State,

465; *Wilson v. Wheeling*, 19 W. Va. 323; *Welsh v. St. Louis*, 73 Mo. 71.

⁵ Ante, § 604; *Vogel v. New York*, 92 N. Y. 10; *Sturges v. Theological Education Soc.* 130 Mass. 414; *Khron v. Brock*, 144 Mass. 516.

⁶ *Kepperly v. Ramsden*, 83 Ill. 354; *Robinson v. Webb*, 11 Bush, 464; *Reed v. Allegheny City*, 29 Smith, Pa. 300; *Connors v. Hennessey*, 112 Mass. 96;

other who is suitable, the latter only, and not the former, must pay the damages to a third person from a fire communicating, which he negligently sets.¹ There are some difficulties and apparent differences of judicial opinion in the application of these rules, but they need not be here further explained.²

§ 607. **Sub-contractor.** — A sub-contractor is but a contractor with the first contractor. So that his legal position appears from the foregoing explanations. Thus, where one under contract to make alterations in a building sub-let the putting in of the gas, and through the gasfitter's negligence it exploded and injured another, the former was not required to pay the damages.³ And where persons were permitted to build a sewer in a street, being like contractors though not such in form, and they let out the work to another through whose negligent manner of leaving the sewer at night a third person was injured, they were held not liable to him.⁴ If the injury comes through the negligence of a servant, the test to determine the responsibility is to inquire who was the master. He will be the person to sue.⁵

III. *In what Circumstances the Master is liable to Third Persons for the Torts of his Servant.*

§ 608. **On what Principle.** — In reason and in law, one is under some responsibility, though not always heavy, who simply puts another in a position to do a wrong. And it is a rule of the law that, as between two innocent persons, the one who has done this shall, if such other inflicts an injury which may be made by the court to fall on either, bear the loss.⁶ A

Lawrence v. Shipman, 39 Conn. 586 ; Chicago v. Robbins, 2 Black, 418.

¹ Ferguson v. Hubbell, 97 N. Y. 507. And see Burbank v. Bethel Steam Mill, 75 Maine, 373.

² And see McCafferty v. Spuyten Duyvil, &c. Rld. 61 N. Y. 178 ; New York v. Bailey, 2 Denio, 433 ; Sulzbacher v. Dickie, 6 Daly, 469 ; New Orleans, &c. Rld. v. Hanning, 15 Wal.

649 ; Vanderslice v. Philadelphia, 7 Out. Pa. 102 ; Coughtry v. Globe Woollen Co. 56 N. Y. 124.

³ Rapson v. Cubitt, 9 M. & W. 710.

⁴ Blake v. Ferris, 1 Selden, 48.

⁵ Milligan v. Wedge, 12 A. & E. 737 ; New Orleans, &c. Rld. v. Reese, 61 Missis. 581 ; The Harold, 21 Fed. Rep. 428.

⁶ Bishop Con. § 672, note, 673 ;

person who takes another into his service, or who simply holds out another as his servant,¹ or who acts or causes his servant to act in a way implying an authority greater than as between him and the servant exists,² brings himself within this principle. And he does more; he comes within the further principle that he who procures a thing to be done is answerable as doer.³ This is so even where the servant is such only by estoppel, or where his doing is in excess of his authority in fact; for, in such a case, he procured the injured third person to accept the unauthorized thing as authorized. Or, if such injured person had no voice in the transaction, and the wrong was simply thrust upon him, still, it having been done in the business and on behalf of one who had put the doer in a position to accomplish it, and had prompted him to action,⁴ such master, however innocent in fact, should bear the loss rather than the one who had done nothing to bring it upon himself.⁵ Hence, —

§ 609. **Doctrine defined.** — If one's servant, whether such in fact or only by estoppel, by performing an act which the master has authorized,⁶ or within the scope of his real or apparent authority though not otherwise authorized,⁷ or within the duty by law incumbent on one discharging a trust which the master has committed to him,⁸ injures another in a way

Hertell v. Bogert, 9 Paige, 52; *Rawls v. Deshler*, 4 Abb. Ap. 12.

¹ Ante, § 600, 601.

² *St. Joseph, &c. Rld. v. Wheeler*, 35 Kan. 185; *Hanson v. Mansfield Ry. &c. Co.* 38 La. An. 111.

³ Ante, § 522, 524, 604, 606.

⁴ "The ground is, that he has put it in the servant's power to mismanage the carriage, by intrusting him with it." *Erskine, J. in Sleath v. Wilson*, 9 Car. & P. 607.

⁵ Another illustrative branch of the doctrine is, that he who supplies to one the means of committing a fraud on a particular person is liable to any other person on whom the fraud is perpetrated. *Wilson v. Green*, 25 Vt. 450.

⁶ *Lee v. Sandy Hill*, 40 N. Y. 442; *Andrews v. Runyon*, 65 Cal. 629;

Maier v. Randolph, 33 Kan. 340; *Gregory v. Piper*, 9 B. & C. 591.

⁷ *Hawes v. Knowles*, 114 Mass. 518; *Passenger Rld. v. Young*, 21 Ohio State, 518; *Smith v. Webster*, 23 Mich. 298; *Heenrich v. Pullman Palace Car*, 20 Fed. Rep. 100; *Conner v. Citizens Street Ry.* 105 Ind. 62; *Geraty v. Stern*, 30 Hun, 426; *Miller v. Burlington, &c. Rld.* 8 Neb. 219; *Patten v. Rea*, 2 C. B. N. s. 606, 3 Jur. N. s. 892; *Banister v. Pennsylvania Co.* 98 Ind. 220; *McManus v. Crickett*, 1 East, 106.

⁸ *Galena, &c. Rld. v. Rae*, 18 Ill. 488; *Goddard v. Grand Trunk Ry.* 57 Maine, 202; *Stewart v. Brooklyn, &c. Rld.* 90 N. Y. 588; *Columbus, &c. Ry. v. Powell*. 40 Ind. 37; *Craker v. Chicago, &c. Ry.* 36 Wis. 657.

which would render the master liable were it done by himself, he is to the same extent responsible to the person injured.¹ A few further explanations of the doctrine will be helpful; thus, —

§ 610. **In Disobedience of Orders.** — Where the servant is acting within the scope of his employment, it is no answer to an injured third person's suit against the master that the servant inflicted the injury in disobedience of orders, or otherwise in violation of his duty to the master.² Thus, where an omnibus driver, in the master's absence, and in wilful disregard of instructions, so drove his vehicle as to obstruct and injure a rival omnibus, the master was held liable for the damages.³ And where a servant, in disobedience to orders, left at the end of a day's work the master's truck in the street instead of the yard provided for it, whereby a collision occurred in the street resulting in damage, the loss was adjudged to be within the responsibility of the master.⁴ One told his boys to drive out from his lot some trespassing cattle, but not with dogs. The boys employed dogs, and thereby inflicted an injury. The person giving the order was held answerable for this consequence of disobedience.⁵ Hence, —

¹ *Poulton v. London, &c. Ry.* Law Rep. 2 Q. B. 534; *Haywood v. Hedrick*, 94 Ind. 340; *Pittsburgh, &c. Ry. v. Kirk*, 102 Ind. 399; *Lannen v. Albany Gas-light Co.* 44 N. Y. 459; *Louisville Gas Co. v. Gutenkuntz*, 82 Ky. 432; *Roney v. Aldrich*, 44 Hun, 320; *Finklestein v. New York Cent. &c. Rld.* 41 Hun, 34; *Shea v. Sixth Ave. Rld.* 62 N. Y. 180; *Mulvehill v. Bates*, 31 Minn. 364; *Snyder v. Hannibal, &c. Rld.* 60 Mo. 413; *McGlothlin v. Madden*, 16 Kan. 466; *Robinson v. Webb*, 11 Bush, 464; *Fort v. Union Pac. Rld.* 2 Dil. 259; *Gray v. Portland Bank*, 3 Mass. 364, 385; *Foster v. Essex Bank*, 17 Mass. 479, 509; *Shaw v. Reed*, 9 Watts & S. 72; *Priester v. Angley*, 5 Rich. 44; *Russell v. Irby*, 13 Ala. 131; *Armstrong v. Cooley*, 5 Gilman, 509.

² Post, § 614; *Limpus v. London Gen. Om. Co.* 1 H. & C. 526; *Powell*

v. Deveney, 3 Cush. 300; *Philadelphia, &c. Rld. v. Derby*, 14 How. U. S. 468, 486; *Sleath v. Wilson*, 9 Car. & P. 607; *Southwick v. Estes*, 7 Cush. 385 (the qualification in the last clause of the note, "if not done in wilful disregard of those orders," is not an accurate expression of the law, which holds it immaterial whether the disregard is wilful or not); *Duggins v. Watson*, 15 Ark. 118; *Commonwealth v. New York, &c. Rld.* 112 Mass. 412; *Betts v. De Vitre*, Law Rep. 3 Ch. Ap. 441; *Toledo, &c. Ry. v. Harmon*, 47 Ill. 298.

³ *Limpus v. London Gen. Om. Co.* supra.

⁴ *Powell v. Deveney*, supra.

⁵ *Schmidt v. Adams*, 18 Mo. Ap. 432. Where, in *Haack v. Fearing*, 5 Rob. N. Y. 528, the sailing master of a yacht fired a gun in the absence of

§ 611. **In Master's Service Unauthorized.** — *A fortiori*, if simply the wrongful thing, done by the servant while acting in the master's service, is within the general scope of his duties, but is not otherwise authorized, the master will be liable. And it is commonly immaterial whether the servant's act was wilful or only negligent.¹ For example, one told his servant to go to a place named and kill a beef. He went, found there a bull, and killed it. The bull belonged to a third person, and the master was compelled to pay him the damage.² And it was the same where a servant, cutting timber for his master, overstepped the bounds and cut timber on a neighbor's land.³ So, if one writes an article and employs another to translate it, he is responsible for the translation should it be a libel, though it becomes such through the inaccuracy of the translator.⁴ If the engineer of a locomotive unnecessarily and wantonly sounds the whistle near a highway, and thereby frightens horses which run and kill another horse, the railroad must pay for the horse killed.⁵ In the absence of a hotel keeper, his servants while performing their duties assault a guest; he is liable.⁶

§ 612. **Not in Line of Employment.** — For what a servant does unauthorized, not within the line of his employment, the master is not answerable.⁷ Or, to express the distinction in

the owner and contrary to his command, inflicting damage by the negligent manner of doing it, the owner was held not to be liable. As to which, query. Perhaps, in this sort of case, there is a difference between a command to do and one not to do. See also *Oxford v. Peter*, 28 Ill. 434.

¹ Post, § 614; *Smith v. Webster*, 23 Mich. 298; *Wright v. Compton*, 53 Ind. 337; *Barwick v. English Joint Stock Bank*, Law Rep. 2 Ex. 259, 265; *Chicago, &c. Rld. v. Dickson*, 63 Ill. 151; *McCann v. Tillinghast*, 140 Mass. 327; *Galena, &c. Rld. v. Rae*, 18 Ill. 488; *Fort v. Union Pac. Rld.* 2 Dil. 259; *Bryant v. Rich*, 106 Mass. 180; *Ochsenbein v. Shapley*, 85 N. Y. 214; *Schulte v. Holliday*, 54 Mich. 73; *Sadler v. Henlock*, 4 Ellis & B. 570; *Lan-*

nen v. Albany Gas-light Co. 44 N. Y. 459; *Tuel v. Weston*, 47 Vt. 634; *Quinn v. Power*, 87 N. Y. 535; *Gray v. Pullen*, 5 B. & S. 970; *Wayland's Case*, 3 Salk. 234; *Levi v. Brooks*, 121 Mass. 501; *Whiteley v. Pepper*, 2 Q. B. D. 276.

² *Maier v. Randolph*, 33 Kan. 340.

³ *Smith v. Webster*, *supra*.

⁴ *Wilson v. Noonan*, 27 Wis. 598.

⁵ *Billman v. Indianapolis, &c. Rld.* 76 Ind. 166.

⁶ *Wade v. Thayer*, 40 Cal. 578. See *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637; *Great Western Ry. v. Miller*, 19 Mich. 305; *Kline v. Central Pac. Rld.* 37 Cal. 400.

⁷ *Edwards v. London, &c. Ry. Law Rep.* 5 C. P. 445; *Foster v. Essex Bank*, 17 Mass. 479, 510; *Wilson v.*

the words of Lord Kenyon, C. J. masters "are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his misconduct in those things that do not respect his duty to them."¹ Thus, one put his mare in another's livery stable for keeping, and outside of the contract for keeping instructed the latter's servant to exercise her. The servant did it immoderately, causing her death, yet the master was adjudged not responsible.² The owners of a foundry gave ashes to an employee who removed them out of working hours. In the place where he deposited them a child, coming in contact with them, was burned; but the owners were held not liable.³ Workmen boarding themselves while repairing a railroad track took their dinners with them, and at the dinner-hour built within the right of way, to warm their coffee, a fire which communicated to adjoining land and did damage; the road was held not chargeable.⁴ If one employed to drive a cart takes it out unauthorized on his own business, the master cannot be compelled to make good a damage inflicted by his careless driving.⁵

§ 613. *Distinction further Illustrated.*—The distinction between the cases wherein the master is liable and wherein he is not, stated in the last two sections, is sometimes nice and difficult; and the applications of it, by the courts, would seem not to be absolutely harmonious. One case, about which there would probably be no disagreement, holds that if a brakeman kicks a person illegally attempting to board a train, the road

Pevery, 2 N. H. 548; *Yates v. Squires*, 19 Iowa, 26; *McClenaghan v. Brock*, 5 Rich. 17; *Peck v. Michigan Cent. Rld.* 57 Mich. 3; *Little Miami Rld. v. Wetmore*, 19 Ohio State, 110; *Kerns v. Piper*, 4 Watts, 222; *Weldon v. Harlem Rld.* 5 Bosw. 576; *McCarthy v. Boston*, 135 Mass. 197; *Jewell v. Grand Trunk Ry.* 55 N. H. 84; *Aldrich v. Boston, &c. Rld.* 100 Mass. 31; *Southern Exp. v. Fitzner*, 59 Missis. 581; *Walton v. New York Cent. Sleep. Car Co.* 139 Mass. 556.

¹ *Ellis v. Turner*, 8 T. R. 531, 533.

And see *Grammer v. Nixon*, 1 Stra. 653.

² *Adams v. Cost*, 62 Md. 264.

³ *Burke v. Shaw*, 59 Missis. 443.

⁴ *Morier v. St. Paul, &c. Ry.* 31 Minn. 351.

⁵ *Rayner v. Mitchell*, 2 C. P. D. 357; *Sheridan v. Charlick*, 4 Daly, 338; *Rahn v. Singer Manuf. Co.* 26 Fed. Rep. 912; *Storey v. Ashton*, Law Rep. 4 Q. B. 476. See, for the limit of the doctrine, *Powles v. Hider*, 6 Ellis & B. 207; *Mulvehill v. Bates*, 31 Minn. 364.

is responsible, but not if the person is not so attempting.¹ For to keep intruders off the cars is within the proper functions of a railroad servant, so that if he employs improper means the road must answer for it; but it is wholly outside of those functions to commit assault and battery on persons in the neighborhood of the track.² Where, therefore, a conductor stopped his train, pursued with pistol in hand a boy on foot into his father's house, seized the boy, and carried him off in the cars, this was held to be outside of the conductor's employment, so the road was not chargeable.³ But it is reasonably plain that not all judges would assent to this. If the conductor's wrongful conduct had stopped with the assault, the road's non-liability would have been clear; but it is one of the chief duties of a railroad conductor to determine who shall ride in the cars and who not.⁴ Therefore if the conductor puts off one entitled to a passage, or carries one beyond the station at which he has the right to leave, the road, by the every day practice of the courts, is compellable to pay him damage. Why, then, does not the like consequence follow when he wrongfully forces a person into the cars and carries him away? We are thus led to another distinction; namely, —

§ 614. **Wilful or Careless.** — Contrary to what we have seen to be the ordinary doctrine,⁵ there are cases which appear to hold the master not responsible for the servant's wilful acts of disobedience, to the injury of a third person, where, the thing being within the scope of his employment, he would be for negligent ones.⁶ Pursuant to which distinction it was in

¹ *Molloy v. New York Cent. &c.* Rld. 10 Daly, 453.

² *Porter v. Chicago, &c.' Ry.* 41 Iowa, 358.

³ *Gilliam v. South, &c. Alabama* Rld. 70 Ala. 268.

⁴ *Post*, § 619.

⁵ *Ante*, § 610; *Howe v. Newmarch*, 12 Allen, 49.

⁶ *Brown v. Purviance*, 2 Har. & G. 316; *Deihl v. Ottenville*, 14 Lea, 191; *Attaway v. Cartersville*, 68 Ga. 740; *Corsicana v. White*, 57 Texas, 382. In

Wood v. Detroit Street Ry. 52 Mich. 402, 404, *Cooley, C. J.* discourses as follows: "The inference from [certain facts in contemplation] might be, that the driver purposely, and in the anger excited by their altercation, ran his car against the plaintiff's wagon; and, if the action had been brought for the trespass, it might become necessary to decide whether, under cases like *Wright v. Wilcox*, 19 Wend. 343, the defendant would be responsible. In that case it was decided that, where the servant

one case laid down, that, if the driver of a street car wantonly strikes a boy riding on it, whereby the boy is thrown off, then negligently drives over him, the car-owners must pay damage for the careless driving but not for the blow.¹ Perhaps under the common-law practice, the form of the action against the master for the servant's wilful trespass in discharging a duty to him should be case and not trespass.² But, whether so or not, the principles which render the master liable³ admit of

wilfully drove his master's conveyance over a third person and injured him, the trespass was that of the servant, for which the master was not liable. The case was followed in *Richmond Turnpike v. Vanderbilt*, 1 Hill, N. Y. 480, s. c. in error, 2 Comst. 479, where the master of a vessel had purposely run the vessel into another; and in *Illinois Cent. Rld. v. Downey*, 18 Ill. 259, where the engineer upon a railroad had purposely run his engine over live stock. Also in *De Camp v. Mississippi, &c. Rld.* 12 Iowa, 348, and many other cases. The general principle that the master is not liable for his servant's trespasses is familiar, and was recognized by this Court in *Chicago, &c. Ry. v. Bayfield*, 37 Mich. 205. And if it were important to determine whether the injury was one purposely inflicted and not one resulting from carelessness, the question would no doubt be one to be submitted to the jury. *Rounds v. Delaware, &c. Rld.* 64 N. Y. 129."

¹ *Pittsburg, &c. Ry. v. Donahue*, 20 Smith, Pa. 119.

² *McManus v. Crickett*, 1 East, 106, 108. This is the English case commonly cited by those American courts which hold the master not to be responsible. Perhaps the learned English tribunal meant to decide so, but what it really held was that trespass would not lie. The further proposition that case will not lie is inference. And if we assume it to hold that neither is maintainable, it is flatly contrary to the present English doctrine. Having in mind this interpretation, a late English

writer well says that *Limpus v. London Gen. Om. Co.* 1 H. & C. 526, and *Seymour v. Greenwood*, 7 H. & N. 355, "overrule *McManus v. Crickett*." *Pollock's Torts*, 80, note. Still I do not observe that *McManus v. Crickett* is mentioned and overruled in terms. Among the judicial observations in *Limpus v. London Gen. Om. Co.* we have, from Byles, J.: "It is said that what was done was contrary to the master's instructions; but that might be said in ninety-nine out of a hundred cases in which actions are brought for reckless driving. It is also said that the act was illegal. So, in almost every action for negligent driving, an illegal act is imputed to the servant." p. 541. And *Blackburn, J.* "It is admitted that a master is responsible for the illegal act of his servant, even if wilful, provided it was within the scope of the servant's employment, and in the execution of the service for which he was engaged." p. 541. *Wightman, J.* dissented from the conclusion under the particular facts. In 9 Jur. n. s. 333, this case is reported under the name of *General Om. Co. v. Limpus*, and *Wightman's* dissenting opinion is printed as the unanimous opinion of the court. Of course, the report being wrong, the head-note is the reverse of what it should be. But curiously this erroneous head-note finds its way into *Fisher's Digest*, a work in many respects exceptionally accurate, as the decision in the case, and the Jurist title as the title of the case.

³ Ante, § 608.

no distinction between the servant's negligent and wilful misdoings, and so are the present English authorities and most of the American ones; the doctrine being that, in either case, the master is liable if the act of wrong was within the scope of the servant's duty, otherwise if it was an outside wrong which the servant had temporarily abandoned the service to perform.¹ Undoubtedly a servant's mere individual malice is not imputable to the master;² but, where the master has assumed responsibility for the servant's acts within defined limits, being what he necessarily does when he employs a servant to exercise a jurisdiction within those limits, it can make no difference to third persons complaining whether the servant's private purposes were of the one sort or of the other.³ Another principle, sometimes helpful, is that, —

§ 615. **Discretion in Servant.** — If, from the nature of the case or otherwise, the servant has a discretion as to the manner of doing a thing, his choice binds the master, making the latter responsible for the method adopted.⁴ There is then, as between master and servant, no departure by the latter from his authority.⁵

§ 616. **Ratification.** — by the master, of the servant's unauthorized act may charge him.⁶

¹ Ante, § 610, and the cases there cited, and subsequent sections; *Terre Haute, &c. Rld. v. Graham*, 46 Ind. 239; *Indianapolis, &c. Ry. v. Anthony*, 43 Ind. 183; *Hawes v. Knowles*, 114 Mass. 518. And see *Arasmith v. Temple*, 11 Bradw. 39.

² *Wallace v. Finberg*, 46 Texas, 35.

³ All sorts of things have been loosely said on this question; such as, — "The rule is, that an employer is not liable for a wilful injury done by an employee, though done while in the course of his employment, unless the employee's purpose was to serve his employer by the wilful act." *Marion v. Chicago, &c. Ry.* 59 Iowa, 428, 430. A good deal of seeming authority could be collected for this distinction; but, being antagonistic to reason, and not

having gained a footing as a mere technical doctrine, it cannot be law so long as the law is a system of reason. Still it is not impossible there may be circumstances wherein the purpose and even the motives of the servant are deserving of consideration on the question whether or not his act was within the scope of his employment.

⁴ *Bayley v. Manchester, &c. Ry.* Law Rep. 7 C. P. 415, 8 C. P. 148; *Greenwood v. Seymour*, 8 Jur. N. S. 214; s. c. nom. *Seymour v. Greenwood*, 7 H. & N. 355; *Mulvehill v. Bates*, 31 Minn. 364.

⁵ Post, § 748.

⁶ *Byne v. Hatcher*, 75 Ga. 289; *Galveston, &c. Ry. v. Donahoe*, 56 Texas, 162; *Coomes v. Houghton*, 102 Mass. 211.

IV. *The Servant's Negligence causing or combining with the Contributory Negligence of an Injured Third Person.*

§ 617. **Obscurities.** — The authorities have not made very distinct the doctrine of this sub-title. It is sufficiently plain in reason, but the differing and often complicated facts of cases render it sometimes not easy of application. It is that —

§ 618. **Doctrine defined.** — One cannot complain of what another does with his consent or especially at his solicitation.¹ And it is not otherwise though the consent or solicitation comes through an agent, either in fact authorized, or under such appearance of authorization as will render the principal chargeable with his conduct.² Hence, if one's servant invites or recommends a third person to do a thing, then if in respect of the thing the servant or his master negligently injures this third person, the master, when sued for the injury, cannot set up in defence such doing as being the contributory negligence of the plaintiff. But if the invitation or recommendation related to a matter outside of the servant's employment, it will have no other effect than would a similar enticement from an indifferent person whose means of information and knowledge were the same. To illustrate, —

§ 619. **Railroad Conductor's Permission — Engineer's — Brakeman's.** — It being a function of a railroad conductor to determine who shall ride in the cars, if, contrary to a rule of the road forbidding passengers to be carried upon freight and construction trains, the conductor of such a train accepts a passenger who is ignorant of the rule and is injured, the road, on being sued for the damage, cannot set up in defence, as contributory negligence, this violation of the rule and its dangers.³ But an engineer has not the same authority; so that, if he permits one to ride in violation of a rule of the road, the like consequence does not follow.⁴ Or, if a brakeman, not

¹ Ante, § 49-53, 291.

² Ante, § 600, 601, 608, 609.

³ Hanson v. Mansfield Ry. &c. Co.

38 La. An. 111; St. Joseph, &c. Rld. v. Wheeler, 35 Kan. 185.

⁴ Chicago, &c. Rld. v. Casey, 9 Bradw. 632.

having a conductor's authority, invites one to jump on a train while in motion, this person's contributory negligence in jumping is a good answer by the road if sued for a resulting injury.¹ Yet where the person invited was a boy of fifteen, and the jury under a proper instruction had rendered a verdict against the road, for a resulting injury, the appellate court suffered it to stand. It was observed that they had the right to weigh all the facts, to consider his youth, special circumstances urging his return home, the short time allowed him for decision and action, and the invitation from an employee of the road, dressed in its uniform, and for whose action it was in a measure responsible.² Again, —

§ 620. **Unloading Wood.** — One drawing wood to a railroad was ordered by its agent to unload it at a narrow platform where his team must necessarily be partly on the track. Standing there, it was struck by a passing car. And a verdict in his favor for damages was approved by the court.³

§ 621. **Servant's Invitation to Customer.** — A customer was in a trader's store. She was invited by the clerk into a dark part of it, where there was an open trap-door, through which she fell and broke her arm. And, she not being otherwise negligent, the master was adjudged to be liable.⁴

V. *The Liability of the Servant for his own Torts committed in the Service.*

§ 622. **Master's Command.** — Servants are under the same duty as their masters to obey the law and abstain from injuring others. Therefore the command of a master never justifies the servant in committing a trespass, a fraud, or other tort.⁵ In such a case, both master and servant are liable, within the principles stated in a preceding chapter.⁶ Hence, —

¹ *Cotter v. Frankford, &c. Ry.* 15 Philad. 255. And see *Snyder v. Hannibal, &c. Rld.* 60 Mo. 413.

² *Western, &c. Rld. v. Wilson*, 71 Ga. 22. And see *Downey v. Hendrie*, 46 Mich. 498.

³ *Foss v. Chicago, &c. Ry.* 33 Minn. 392.

⁴ *Freer v. Cameron*, 4 Rich. 228.

⁵ *Bishop Con.* § 1117, 1118; *Sands v. Child*, 3 Lev. 351; *Mires v. Solebay*, 2 Mod. 242; *Peck v. Cooper*, 112 Ill. 192.

⁶ *Ante*, § 518-524; *Michael v. Ales-tree*, 2 Lev. 172; *Reynolds v. Hanrahan*, 100 Mass. 313; *Perkins v. Smith*,

§ 623. **Doctrine defined.** — For whatever torts a servant commits, contrary to what would be his duty if he were acting for himself, whether within the line of his service or not, and whether he binds the master or not, he is to the same degree personally responsible as though he were not in service.¹ For example, —

§ 624. **Conversion.** — If a servant converts another's goods, though to his master's use, he is personally answerable to the owner.² But if, with the owner's consent, he simply takes them, then the master himself converts them, the latter only is liable.³ So, —

§ 625. **Fraud.** — A servant must answer to an injured third person for a fraud committed in behalf of the master, whether the latter joins him therein or not.⁴ Of course, —

§ 626. **For a Trespass** — in the master's service, the servant is liable; as, where the manager of a coal-mining company by mistake carried the work beyond the company's line into adjoining land, and the company sold the coal, he and it were held to be jointly answerable to the owner.⁵ Likewise, —

§ 627. **Negligent Misfeasance.** — If a servant does a thing for his master negligently, to the injury of a third person, the servant as well as the master must respond in damage.⁶ Still, —

§ 628. **Passive Neglects.** — No person is answerable to another for the ill results of his negligence unless he owed to the other some duty.⁷ A servant, like his master, is under a duty to all men not to injure them by acts of misfeasance.

Say. 40; *Attorney-General v. Perry*, 2 Comyns, 481, 486; *Wilson v. Stewart*, 3 Best & S. 913; *Hill v. Caverly*, 7 N. H. 215. See *Lee v. Bayes*, 18 C. B. 599; s. c. nom. *Lee v. Robinson*, 2 Jur. N. S. 1093.

¹ *Naish v. East India Co.* 2 Comyns, 462, 469; *The State v. Walker*, 16 Maine, 241.

² *Stephens v. Elwall*, 4 M. & S. 259; *Cranch v. White*, 1 Scott, 314, 1 Bing. N. C. 414; *Perkins v. Smith*, 1 Wils. 328; *Mires v. Solebay*, 2 Mod. 242; *Porter v. Thomas*, 23 Ga. 467.

³ *Silver v. Martin*, 59 N. H. 580.

⁴ *Bishop Con.* § 1118; *Cullen v. Thomson*, 4 Macq. Ap. Cas. 424, 9 Jur. N. S. 85.

⁵ *Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403; *Mires v. Solebay*, 2 Mod. 242.

⁶ *Harriman v. Stowe*, 57 Mo. 93.

⁷ *Ante*, § 446.

Hence his responsibility if he breaks this duty. But the positive duties, the non-discharge whereof creates legal liability, are mostly those which a particular person owes to a particular other person; as, the duty of a specific man to support his individual wife or child, not of all men to maintain all wives and all children. The master, for further example, is under obligation to the particular man to pay to him his own debt, but it is not incumbent on the servant to pay the master's debts. So that, though the master puts into his servant's hands the money to pay what he owes to a third person, still the servant is under no duty to this person, who, therefore, has no right of action against him should he decline.¹ Consequently the doctrine has become general, subject doubtless to exceptions, where this reasoning would make them, that the servant is not suable by the third person for a mere neglect to do, as distinguished from a negligent doing, but the master alone is liable.² Thus, though a sheriff may perform his duties by deputy, if a deputy to whom a matter is committed neglects them, the former only is answerable for the neglect.³ And a servant cannot be sued for not lifting the gate of a dam, when the duty is the master's and not his.⁴

§ 629. **To the Master**—the servant owes duties both positive and negative. And for the breach of any of them the former may compel compensation; as, for doing work unskillfully, falsely, or insufficiently;⁵ or, for injuring the master's animals or other property, by a neglect of duty, by the want of such skill as the particular contract of service implies, or by wilful misconduct.⁶ Yet if without fault a servant brings loss to his master, he cannot be required to make it good; as if, being in the service of a common carrier, he loses a parcel, he can be required to pay for it only if negligence is shown

¹ *Baron v. Husband*, 4 B. & Ad. 611; *Howell v. Batt*, 5 B. & Ad. 504.

² *Perkins v. Smith*, Say. 40, 42; *Lane v. Cotton*, 12 Mod. 472, 488. And see ante, § 526; *Osborne v. Morgan*, 137 Mass. 1.

³ *Cameron v. Reynolds*, Cowp. 403, 406.

⁴ *Hill v. Caverly*, 7 N. H. 215.

⁵ *Waul v. Hardie*, 17 Texas, 553; *Norris v. Staps*, Hob. 210 b; *Rex v. Kilderby*, 1 Saund. Wms. ed. 311, 312.

⁶ *Newton v. Pope*, 1 Cow. 109; *Hathaway v. Smith*, 2 Tyler, 248; *Zulkee v. Wing*, 20 Wis. 408; *Gilson v. Collins*, 66 Ill. 136.

against him.¹ And always, if the master's negligence contributes to the servant's, the ordinary rule applies, and he cannot maintain his action. It is so, for example, if he provided for the servant defective plans or unsuitable tools.² So, —

§ 630. **Indemnity.** — Within a principle already stated,³ when the master has been made liable to a third person for the wrongful act of his servant, and has paid the damage, he is entitled to recover it of the servant.⁴

VI. *One's own Servant's Contributory Negligence.*

§ 631. **Already.** — In the chapter on "Parent and Child, Infancy," we considered the principles which should govern this sub-title.⁵ Now, applying those principles, —

§ 632. **The Rule** — in reason is, that, if a master is free from carelessness in selecting and instructing his servants, if he is absent when an injury comes to his property or other interests through the negligence of a third person, and if his own negligence in no degree contributed to it, should then the negligence of his servant contribute, it is to be regarded the same as though the contribution was from a person having no connection with him;⁶ in other words, it will not impair his claim for damages. Still, —

§ 633. **In Authority.** — While this rule is the inevitable deduction from principles settled by adjudication, and while the reasoning of the law leads to it conclusively and leaves no doubt, it would be difficult to find cases wherein it was announced by the judges as the ground of their decision. It seems even to have been laid down that the claim of the person suffering is in such circumstances vitiated by the negligence of his servant.⁷ And there is considerable probability that this sort of doctrine has been often tacitly assumed. Hence, —

¹ *Savage v. Walthew*, 11 Mod. 135.

² *Wilder v. Stanley*, 49 Vt. 105.

³ Ante, § 535.

⁴ *Smith v. Foran*, 43 Conn. 244.

⁵ Ante, § 573, 578, 584, and connected and intermediate sections.

⁶ "Contributory negligence, to defeat a right of action, must be that of the party injured." Head-note to *Paulmier v. Erie Rld.*, 5 Vroom, 151.

⁷ *Page v. Hodge*, 63 N. H. 610.

§ 634. **Conclusion.** — Without repeating the reasoning on this subject, which is abundantly stated in the sections referred to in the opening section of this sub-title, and in the places and sections therein cited, we may conclude by saying that the books contain no sufficient direct adjudications to justify the overturning of the principles of the common law governing the question, and the deductions of the law's reasonings. If the author is asked by a reader seeking practical information, how the court before which he practises will hold this question in future, the reply is that nobody can tell him. The probability is that it will depend upon the skill and accuracy with which the reasoning on the right side is presented to the tribunal.

§ 635. *The Doctrine of this Chapter restated.*

A master is one who, by contract or otherwise, stands in a position of command toward another, termed his servant. Every servant has a master and every master a servant. As to third persons, claiming anything of the master, any person is a servant whom he holds out or permits to act as such. A contractor to do a thing is not a servant if he is only to bring about a stipulated result; but he is if the person employing him retains the right of dictating and controlling the means to the agreed end. What one does by his servant is regarded in law as done by himself; therefore third persons, injured by the acts of the servant, may enforce their claims against the master, or against the servant, or both, at their election. Yet they can have but one compensation.¹ And if the master pays it, having been himself without fault, the servant is required to indemnify him; otherwise, if the master commanded the wrongful thing or if in any degree he personally participated therein. The master's liability extends to all wrongs of the servant in the line of the service, whether wilful or negligent, but not to the servant's independent torts committed outside of the sphere of his employment.

¹ Ante, § 519.

CHAPTER XXXII.

THE MASTER'S DUTIES AND LIABILITIES TO THE SERVANT, FELLOW SERVANTS.

- § 636. Introduction.
- 637-641. Doctrine in Outline.
- 642-657. Master's Non-assignable Duties.
- 658-660. Master's Assignable Duties.
- 661-669. His Substitutes and Agents.
- 670-673. Fellow Servants.
- 674-681. Servant taking Risks, his Contributory Negligence.
- 682-686. Liabilities of Master.
- 687. Liabilities of Servants to One Another.
- 688-690. Statutory Modifications of Doctrines.
- 691. Doctrine of Chapter restated.

§ 636. **How Chapter divided.** — We shall consider, I. The Doctrine in Outline ; II. The Non-assignable Duties of the Master ; III. The Master's Assignable Duties ; IV. The Master's Substitutes and Agents ; V. Fellow Servants ; VI. The Servant's Assumptions of Risks and his Contributory Negligence ; VII. The Liabilities of the Master ; VIII. The Liabilities of Servants to One Another ; IX. Statutory Modifications of the Doctrines.

I. *The Doctrine in Outline.*

§ 637. **Right to Live.** — The main pillars of the law of this chapter rest on the fundamental principle that God, in creating men, gave them by implication the right to live, and that no one can deprive another of this right. One of the consequences of which principle we have seen to be, that, if an individual in conducting those activities which are a necessary part of life is careful and circumspect, yet unintention-

tionally injures another, he is not compellable to pay an indemnity,¹ but the other must bear uncompensated the loss as he does any other accident, and as a return for the advantages of living in society.² We had in the last chapter almost an exception to this rule in the doctrine of the —

§ 638. **Master's Liability to Third Persons Injured.** — For special reasons already explained,³ a master who has selected servants however carefully is, for their negligent and other evil doings in his service, responsible to third persons injured thereby. But those reasons do not apply to the case of a —

§ 639. **Servant Injured.** — If a master is careful and circumspect in planning his business, if he exercises a reasonable foresight to avoid injuries to his servants, if he selects his servants with proper care, if he duly instructs them in their duty and its dangers, if he puts into their hands what he has reasonable cause to deem suitable tools, machinery, and other things to work with, if he assigns to them what reasonably seems to be a proper place to labor, — if, in short, he is not remiss in the care and precaution which common prudence and the claims of humanity indicate, — then if, through any other person's negligence or wrong, whether a fellow-servant's or third person's, or through any latent defect in the appliances or other things which he has thus carefully provided, one of his servants receives an injury, it is to be ranked among the accidents of life as respects the master's liability, while yet the servant may have against others the same remedies which would be his were he not in the service. In other words, the master is responsible to the servant for his carelessness and for his wilful wrongs, if thereby the latter is injured; but not for what to him is the inevitable.⁴ Such is

¹ Ante, § 10, 11.

² Ante, § 176-184.

³ Ante, § 608.

⁴ The doctrine of this section will be more specifically explained, with the judicial authorities which recognize it, in the subsequent sub-titles. But the reader will also find fragments of it in such cases as the following. *Berns v. Gaston Gas Coal Co.* 27 W. Va. 285;

Buckley v. Gould, &c. Co. 8 Saw. 394; *Hobbs v. Stauer*, 62 Wis. 108; *Waddell v. Simson*, 2 Am. Pa. 567; *Northern Cent. Ry. v. Husson*, 5 Out. Pa. 1; *Philadelphia Iron, &c. Co. v. Davis*, 1 Am. Pa. 597; *Luebke v. Chicago, &c. Ry.* 63 Wis. 91; *McQueen v. Central Branch Union Pac. Rld.* 30 Kan. 689; *St. Louis, &c. Ry. v. Weaver*, 35 Kan. 412; *Columbus, &c. Ry. v. Trossch*,

nearly or quite the universal doctrine of the courts,¹ though the reasoning upon it, for which the particular judge delivering the opinion is responsible, is not always precisely so. Much of what is thus stated as conclusion is, by many or most, deduced from the nature of the contract of hiring.² To say that the reasoning just given in these sections, rather than the other, is the law's reasoning, is not to cast discredit upon the more common form of the argument; for the two are not absolutely antagonistic; and in the main, if not entirely, they may well stand together. Still, —

§ 640. **Servant not by Contract.** — While practically most servants, especially those employed in large enterprises, are such by contract, not all are.³ And it is believed that the doctrines just stated apply to non-contract servants the same as to the common ones. But we shall see in subsequent subtitles that there are doctrines, perhaps not all applicable to non-contract servants, which proceed naturally and necessarily from the express or implied —

§ 641. **Contract of Service.** — What is implied in any contract is as much a part of it as what is expressed.⁴ Therefore largely, as we shall more specifically see in subsequent subtitles, the mutual duties of master and servant depend upon the interpreted contract of hiring. Thus, if one agrees to provide "good and suitable board and lodging" to a laborer, yet sends him to a high mountain pass to sleep on frozen ground with only damp spruce branches for a bed, whereby the laborer becomes sick and paralyzed, he must answer to him in damages.⁵ Within the rule that a contract contrary

68 Ill. 545; *Henry v. Lake Shore, &c. Ry.* 49 Mich. 495; *Piqueño v. Chicago, &c. Ry.* 52 Mich. 40; *Rodman v. Michigan Cent. Rld.* 55 Mich. 57; *United States Rolling Stock Co. v. Wilder*, 116 Ill. 100; *Wheeler v. Watson Manuf. Co.* 135 Mass. 294; *Johnson v. Boston Tow-boat Co.* 135 Mass. 209; *Lopez v. Central Ariz. Min. Co.* 1 Ariz. 464; *Brick v. Rochester, &c. Rld.* 98 N. Y. 211; *Brown v. Winona, &c. Rld.* 27 Minn. 162; *Nason v. West*, 78 Maine, 253; *Hutchinson v. York, &c. Ry.* 5 Exch. 343; *Hall v. Johnson*, 3 H. & C. 589, 11 Jur. N. S. 180.

¹ Compare with post, § 665, 671.

² *Brown v. Winona, &c. Rld.* 27 Minn. 162; *Pittsburgh, &c. Ry. v. Ranney*, 37 Ohio State, 665, 669; *Hutchinson v. York, &c. Ry.* 5 Exch. 343, 351; *Chicago, &c. Ry. v. Ross*, 112 U. S. 377, 382, 383.

³ Ante, § 599-601.

⁴ *Bishop Con.* § 239-256.

⁵ *Clifford v. Denver, &c. Rld.* 9 Colo. 333.

to the policy of the law is void,¹ one of the sort now in contemplation may be so.² But we have not adjudications illustrating this subject very fully. It is laid down in one case that an express agreement exempting the master from liability to the servant for defective machinery is void,³ but another case seems not to hold the doctrine so.⁴ And we shall by and by see that if, without express terms, one agrees to work for another with machinery which both understand to be defective, this is an effectual waiver of all objection to it. Yet, not in conflict with such doctrine, a blind undertaking of this sort, permitting the master to provide whatever he chose to the imminent risk of the servant, might be well deemed violative of the law's policy, therefore void.⁵ To trace now the doctrine more minutely,—

II. *The Non-assignable Duties of the Master.*

§ 642. **Where no Waiver.** — We shall assume, in here describing these duties, that the servant does not waive his right to object to the master's omission of them. That such a waiver will ordinarily⁶ bind the servant, when voluntarily made with full knowledge of the situation, we shall see further on.

§ 643. **Non-assignable and Assignable distinguished.** — It appears upon a consideration of the summary of duties already given,⁷ that there are those which bind the master personally, so that he cannot relieve himself from liability to the servant for a defective performance by assigning, in advance, the work of performing to a presumably competent third person. On the other hand, it appears also, both from the reasons before

¹ Bishop Con. § 470, 474.

² Lake Shore, &c. Ry. v. Spangler, 44 Ohio State, 471. A statute having made railroad companies liable for injuries to their servants caused by the negligence of fellow servants, it was held that they cannot escape this liability by a contract with the servant in advance exempting them. Kansas Pac. Ry. v. Peavey, 29 Kan. 169.

³ Roesner v. Hermann, 10 Bis. 486. Similar is Western, &c. Rld. v. Bishop, 50 Ga. 465.

⁴ Galloway v. Western, &c. Rld. 57 Ga. 512.

⁵ And see 2 Thomp. Neg. 1025.

⁶ See ante, 641.

⁷ Ante, 639.

stated and from the nature of the relation of master and servant, that, when the master has discharged his non-assignable duties, there remain others which he may assign; that is, commit to a carefully chosen servant without being liable to another servant for a default in the performance. The act of employing the servant and setting him at work constitutes in itself such assignment to him of so many of these duties as he undertakes. The former class are for this sub-title. We shall look at them a little in detail; thus, —

§ 644. *Machinery, Tools, and other Appliances* : —

Defined. — Though the master does not guarantee to the servant absolute exemption from accidents,¹ it is his duty to exercise those precautions which the nature and circumstances of the particular case indicate, to render the tools, machinery, and other appliances which he provides, reasonably safe. And a failure to perform this duty, where the servant does not waive it, is, if injury follows, a ground of liability to him.² Its discharge consists in the precautions; subsequently disclosed imperfections, not reasonably avoidable, do not place him in default.³ Some particulars are —

§ 645. **Degree of Care — Knowledge of Master.** — There is believed to be no absolute rule, applicable to all the varying classes of cases, to determine the degree of care required of the master. It has been said that he fulfils his duty in selecting machinery when he exercises ordinary care;⁴ that he is

¹ *Johnson v. Bruner*, 11 Smith, Pa. 58; *Green, &c. Ry. v. Bresmer*, 1 Out. Pa. 103.

² *Ellis v. New York, &c. Rld.* 95 N. Y. 546; *Abel v. Delaware, &c. Canal*, 103 N. Y. 581; *Cooper v. Central Rld.* 44 Iowa, 134; *Perry v. Ricketts*, 55 Ill. 234; *Chicago, &c. Ry. v. Jackson*, 55 Ill. 492; *Boardman v. Brown*, 44 Hun, 336; *Hayes v. Bush, &c. Manuf. Co.* 41 Hun, 407; *Baker v. Allegheny Valley Rld.* 14 Norris, Pa. 211; *Harper v. Indianapolis, &c. Rld.* 47 Mo. 567; *King v. Ohio, &c. Ry.* 14 Fed. Rep. 277; *Bean v. Oceanic Steam Nav. Co.* 24 Fed. Rep. 124; *Bushby v. New York, &c. Rld.* 37 Hun, 104; *Pleasants v. Raleigh, &c.*

Air-line Rld. 95 N. C. 195; *Gibson v. Pacific Rld.* 46 Mo. 163; *Western, &c. Rld. v. Bishop*, 50 Ga. 465; *Houston, &c. Ry. v. Myers*, 55 Texas, 110; *Madden v. Minneapolis, &c. Ry.* 32 Minn. 303; *Towns v. Vicksburg, &c. Rld.* 37 La. An. 630. See *Robinson v. Blake Manuf. Co.* 143 Mass. 528.

³ *Mobile, &c. Rld. v. Thomas*, 42 Ala. 672; *Chicago, &c. Rld. v. Pratt*, 14 Bradw. 346; *Duffy v. Upton*, 113 Mass. 544; *Marvin v. Muller*, 25 Hun, 163; *Wonder v. Baltimore, &c. Rld.* 32 Md. 411.

⁴ *Ex parte Johnson*, 19 S. C. 492; *Sanders v. Etiwan Phos. Co.* 19 S. C. 510.

not responsible, for a defect in a carriage unless aware of it;¹ that an imperfection in machinery, to charge the master, either must have been known by him or by proper diligence he would have known it;² that, in cases calling for tests, they should be applied;³ that, to charge the master with a neglect to furnish safe appliances, the danger must be such as to suggest itself to a man of ordinary prudence;⁴ that he should exercise a high degree of care in furnishing locomotives, &c.;⁵ "all reasonable care consistent with the nature and extent of his business, . . . he is not responsible for hidden defects that could not have been discovered on the most careful inspection;"⁶ and that he, knowing a machine to be out of repair and dangerous, should properly repair it, or warn those using it of the danger.⁷ The result of all which would seem to be that, as precaution should be commensurate with the danger and the consequences of an accident, so should the carefulness with which tools, machines, and other like things are selected, looked after, and kept in repair. Herein the master should exercise the foresight and supervision common to prudent men in like circumstances.

§ 646. **Newest Inventions — How Safe.** — The master, in providing appliances, is not required to adopt every invention as fast as made, or select at his peril the best, or things absolutely safe.⁸ What is suitable and ordinary in point of safety will suffice.⁹ For illustration, where a railroad company used on its cars the kind of oil which was common, and by no ordinary care could it have obtained knowledge of anything

¹ *Priestley v. Fowler*, 3 M. & W. 1.

² *Hull v. Hall*, 78 Maine, 114; *Chicago, &c. Rld. v. Stites*, 20 Bradw. 648.

³ *Texas, &c. Ry. v. Hamilton*, 66 Texas, 92.

⁴ *Nelson v. Allen Paper Car-wheel Co.* 29 Fed. Rep. 840.

⁵ *Toledo, &c. Ry. v. Fredericks*, 71 Ill. 294; *Wedgwood v. Chicago, &c. Ry.* 41 Wis. 478.

⁶ *Devens, J. in Spicer v. South Boston Iron Co.* 138 Mass. 426.

⁷ *Rice v. King Philip Mills*, 144 Mass. 229. And see *Texas, &c. Ry. v.*

McAtee, 61 Texas, 695; *Texas, &c. Ry. v. Bradford*, 66 Texas, 732; *Chicago, &c. Rld. v. Bragonier*, 119 Ill. 51.

⁸ *Chicago, &c. Rld. v. Smith*, 18 Bradw. 119; *Philadelphia, &c. Rld. v. Keenan*, 7 Out. Pa. 124; *Burns v. Chicago, &c. Ry.* 69 Iowa, 450; *Coppins v. New York Cent. &c. Rld.* 43 Hun, 26; *Sanborn v. Atchison, &c. Rld.* 35 Kan. 292; *Hickey v. Taaffe*, 105 N. Y. 26; *Sweeney v. Berlin, &c. Co.* 101 N. Y. 520.

⁹ *Camp Point Manuf. Co. v. Ballou*, 71 Ill. 417.

poisonous in it, an employee was not permitted to recover damages for being poisoned thereby.¹ And an implement with no defect discoverable on inspection satisfies the law; though, in actual use, it gives way and damage follows to a servant.²

§ 647. **Duty, the Master's — (Fellow Servants — Keeping in Repair).** — This duty of providing proper appliances is not a thing pertaining to the service, but it is the master's own. He may employ agents in discharging it;³ but the law does not deem them fellow servants, for the consequences of whose neglect he is not answerable to a servant. His neglect of this duty, whether personal or by agent, is his own.⁴ On the other hand, there is some ground for saying, and by a part of the courts it is held, that, after machinery has been furnished, the keeping of it in order pertains to the running of it, as to which the master's duty is discharged by employing a competent and careful service.⁵ But this exception admittedly requires some qualification;⁶ and, by other of our American courts, it is believed by most, it is not approved; the master's personal duty extending equally to the procuring of safe machinery, and to the keeping of it in safe repair.⁷ Yet, in reason, there

¹ *Kitteringham v. Sioux City, &c. Ry.* 62 Iowa, 285; *Chicago, &c. Rld. v. Lonergan*, 118 Ill. 41.

² *The Dago*, 31 Fed. Rep. 574; *Spicer v. South Boston Iron Co.* 138 Mass. 426. Compare with *Bradbury v. Goodwin*, 108 Ind. 286, where the master was held liable. And see *Ballou v. Chicago, &c. Ry.* 54 Wis. 257.

³ *Shanny v. Androscoggin Mills*, 66 Maine, 420.

⁴ *Pennsylvania, &c. Rld. v. Mason*, 13 Out. Pa. 296; *Bushby v. New York, &c. Rld.* 107 N. Y. 374; *Stringham v. Stewart*, 100 N. Y. 516; *Kain v. Smith*, 25 Hun, 146.

⁵ *McGee v. Boston Cordage Co.* 139 Mass. 445, 448, referring to *Johnson v. Boston Tow-boat Co.* 135 Mass. 209, 212. "Thus," says W. Allen, J. at the place last cited, "a person charged with the duty of keeping the

track of a railway in repair, *Waller v. South Eastern Ry.* 2 H. & C. 102; the chief engineer on a steam-vessel whose duty it was to see that the machinery was kept in order, *Searle v. Lindsay*, 11 C. B. N. s. 429; an 'underlooker' in a mine whose duty it was to examine the roof of the mine and prop it when dangerous, *Hall v. Johnson*, 3 H. & C. 589."

⁶ *Rogers v. Ludlow Manuf. Co.* 144 Mass. 198.

⁷ *Northern Pac. Rld. v. Herbert*, 116 U. S. 642; *Shanny v. Androscoggin Mills*, *supra*; *Benzing v. Steinway*, 101 N. Y. 547; *Chicago, &c. Rld. v. Sullivan*, 63 Ill. 293; *Corcoran v. Holbrook*, 59 N. Y. 517; *Macy v. St. Paul, &c. Rld.* 35 Minn. 200; *Madden v. Chesapeake, &c. Ry.* 28 W. Va. 610, 617; *Riley v. West Virginia Cent. &c. Ry.* 27 W. Va. 145.

is a difference between a radical harm to a machine or the wearing of it out, and those minor things the looking after which practically concerns its common use;¹ and on this line the true distinction may perhaps be deemed to run.

§ 648. *Place to Work*:—

The same Doctrine—applies to the place to work as to the appliances. The master, as a personal duty, must use reasonable care that the place is safe.² And if it is not so,—for example, if his railroad is negligently constructed,³—he cannot excuse himself to a servant injured on the ground that the defect is due to the negligence of a fellow servant.⁴ There are under some facts difficulties, and there may be differences of judicial opinion, in the application of this rule, but the rule itself is well established. To illustrate,—

§ 649. **Instances.**—If a railroad company maintains over its track a bridge so low that a brakeman cannot be carried under it without stooping, and does not warn him of the danger, he can have his action against it should he be injured by his head coming in contact therewith.⁵ But where a railroad bridge was in process of repair, and by reason of it a train was stopped at an unusual place on the bridge, and a brakeman fell through it, the road was held not to be liable;⁶ and plainly, in such a case, the temporary imperfections incident to a repair are not within the general rule. It was also the same where an injury resulted from imperfections in a staging erected by fellow servants in constructing a building.⁷

¹ Webber v. Piper, 109 N. Y. 496.

² Arkerson v. Dennison, 117 Mass. 407; Haley v. Case, 142 Mass. 316; Mayhew v. Sullivan Mining Co. 76 Maine, 100; Ford v. Lyons, 41 Hun, 512; Brickner v. New York Cent. Rld. 2 Lans. 506; Warden v. Old Colony Rld. 137 Mass. 204; Green v. Banta, 48 N. Y. Super. 156; Delaney v. Hilton, 50 N. Y. Super. 341; Illinois, &c. Rld. v. Whalen, 19 Bradw. 116; Knapp v. Sioux City, &c. Ry. 65 Iowa, 91; Goodman v. Richmond, &c. Rld. 81 Va. 576; Allen v. Burlington, &c. Rld. 57 Iowa, 623.

³ Trask v. California Southern Rld. 63 Cal. 96; Texas, &c. Ry. v. Kirk, 62 Texas, 227; Houston, &c. Ry. v. McNamara, 59 Texas, 255; Smith v. Memphis, &c. Rld. 18 Fed. Rep. 304.

⁴ Pantzar v. Tilly Foster Mining Co. 99 N. Y. 363.

⁵ Baltimore, &c. Rld. v. Rowan, 104 Ind. 88; Altee v. South Carolina Ry. 21 S. C. 550. And see Vosburgh v. Lake Shore, &c. Ry. 94 N. Y. 374.

⁶ Koontz v. Chicago, &c. Ry. 65 Iowa, 224.

⁷ Armour v. Hahn, 111 U. S. 313; Peschel v. Chicago, &c. Ry. 62 Wis.

But where a workman is put upon a staging already erected, its negligent construction will charge the master.¹ If a gas company injures a servant by sending him into a room to work where there is escaping gas, it is liable.² A servant's business required him to drive under a revolving shaft, which, between two trips, was without his knowledge so lowered that there was not room to drive under it without injury. And the master was held answerable to him for the resulting harm.³ Still, —

§ 650. **Limit of Master's Liability.** — Though in the cases within our present rule the master is answerable to a servant for a fellow servant's negligence,⁴ beyond this his responsibility is not absolute.⁵ Thus, where one employed another to remove sand from a large oven recently built, and the oven fell in and injured the servant, but the master was chargeable neither with knowledge of its dangerous condition nor with any negligence producing want of knowledge, the latter was held not responsible. "In order for the plaintiff to be entitled to recover in this action," observed Foster, J. "it must be shown that the defendant owed some duty to him and that there was a neglect of that duty. If the plaintiff received an injury as the result of an accident solely, and the defendant was without fault, the action is not maintainable."⁶ And a railroad company is not absolutely bound to protect its servants against danger from storms, landslides, washouts, and other things of the sort.⁷

§ 651. *Information and Instruction* : —

General. — By safe appliances and a safe place, such as we

338 ; *Kelley v. Norcross*, 121 Mass. 508 ; *Hogan v. Field*, 44 Hun, 72 ; *Hoppin v. Worcester*, 140 Mass. 222, 224 ; *Benn v. Null*, 65 Iowa, 407. See *Kelly v. Detroit Bridge Works*, 17 Kan. 558 ; *Roberts v. Smith*, 2 H. & N. 213, 3 Jur. N. S. 469.

¹ *Arkerson v. Dennison*, 117 Mass. 407.

² *Citizens Gas-light, &c. Co. v. O'Brien*, 118 Ill. 174.

³ *Hawkins v. Johnson*, 105 Ind. 29.

⁴ Ante, § 648 ; *Gates v. Southern Minnesota Ry.* 28 Minn. 110, 112.

⁵ *Brown v. Accrington, &c. Co.* 3 H. & C. 511.

⁶ *Nason v. West*, 78 Maine, 253. And see *Pantzar v. Tilly Foster Mining Co.* 99 N. Y. 368, 375 ; *Atlanta Cotton Fac. v. Speer*, 69 Ga. 137 ; *Quincy Coal Co. v. Hood*, 77 Ill. 68.

⁷ *Gates v. Southern Minnesota Ry.* *supra*.

have seen it to be the duty of the master to provide, are meant those which are attended only by the perils incident to the business. Every sort of service has its special dangers, so has nearly every machine or other appliance or situation. As to which, if the servant is not already informed, not if he is,¹ it is the preliminary duty of the master to instruct him. And it is immaterial to this proposition whether the ignorance which is thus to be enlightened proceeds from inexperience, from imbecility, from youth, or from any other cause.² Nor will the fact that the immediate occasion of an injury was the negligence of a fellow servant relieve the master;³ as, where a boy was put under the instruction of an adult in a shop, and told to do a certain thing, whereby he received harm, the master was adjudged to be responsible.⁴ This duty is the master's own, as explained in preceding sections.⁵

§ 652. Rules — Plans. — It has been deemed incumbent on a railroad to make and promulgate such rules for the service as will give reasonable protection to its employees.⁶ And one's failure to follow any precautionary rule, established by competent authority, is negligence.⁷ But not such is its non-observance by one to whom no knowledge of it has come.⁸ Within the principle which governs a railroad's rules, any employer is liable in damages to an injured employee if he causes

¹ *Sullivan v. India Manuf. Co.* 113 Mass. 396; *Curran v. Merchants Manuf. Co.* 130 Mass. 374.

² *Atkins v. Merrick Thread Co.* 142 Mass. 431; *McDade v. Washington, &c. Rld.* 5 Mackey, 144; *Baxter v. Roberts*, 44 Cal. 187; *Jones v. Florence Mining Co.* 66 Wis. 268; *Hickey v. Taaffe*, 105 N. Y. 26; *Huizega v. Cutler, &c. Lumber Co.* 51 Mich. 272; *Dowling v. Allen*, 74 Mo. 13; *Hill v. Gust*, 55 Ind. 45; *O'Connor v. Adams*, 120 Mass. 427; *Anderson v. Morrison*, 22 Minn. 274; *Louisville, &c. Ry. v. Frawley*, 110 Ind. 18; *Parkhurst v. Johnson*, 50 Mich. 70; *Missouri Pac. Ry. v. Callbreath*, 66 Texas, 526; *Fones v. Phillips*, 39 Ark. 17.

³ *Jones v. Florence Mining Co.* supra.

⁴ *Dowling v. Allen*, supra; *Union Pac. Rld. v. Fort*, 17 Wal. 553.

⁵ *Coombs v. New Bedford Cordage Co.* 102 Mass. 572, 599; *Brennan v. Gordon*, 13 Daly, 208; *Missouri Pac. Ry. v. Peregoy*, 36 Kan. 424.

⁶ *Abel v. Delaware, &c. Canal*, 103 N. Y. 581, 586; *Crew v. St. Louis, &c. Ry.* 20 Fed. Rep. 87.

⁷ *Lockwood v. Chicago, &c. Ry.* 55 Wis. 50; *Philadelphia, &c. Rld. v. Kerr*, 25 Md. 521; *Cooke v. Lalance Grosjean Manuf. Co.* 33 Hun, 351; *O'Neill v. Keokuk, &c. Ry.* 45 Iowa, 546; *Deeds v. Chicago, &c. Ry.* 69 Iowa, 164; *Central Rld. v. Harrison*, 73 Ga. 744. See *Grant v. Slater Mill, &c. Co.* 14 R. I. 380.

⁸ *Fay v. Minneapolis, &c. Ry.* 30 Minn. 231.

work to be done, though under contract, after an unskilful and negligent plan.¹

§ 653. *Suitable Superintending and Fellow Servants* : —

Defined. — It is a duty of the master to his servants to exercise ordinary or reasonable care in the selection of superintending and fellow servants ; so that, if through a neglect of this duty he takes into or keeps in his service a person incompetent or otherwise unfit for the particular position, a servant injured by some specific and unjustifiable act or neglect of such unsuitable superintending or fellow servant may have his damages of the master.² For example, —

§ 654. **Instances.** — One who had not learned the carpenter's trade, having worked at it only twelve weeks, was, by a master who knew him to be thus uninstructed, made foreman over a gang of men erecting a building. Through his want of skill, the staging gave way, injuring a workman ; and a verdict against the master was sustained.³ A railroad collision was caused in the night by the sending of an untaught employee to signal an approaching train. Harm resulting to a fellow servant, the road on his suit was held to be rightly charged by the jury with the damage.⁴

§ 655. **Discharging Incompetent Servant.** — If a servant proves to be unfit, or becomes so during the service, it is the master's duty to the other servants, as already intimated, to discharge him.⁵ His being merely slow and lazy would seem to be an unfitness affecting only the master, so that another

¹ Horner v. Nicholson, 56 Mo. 220. And see Pittsburgh, &c. Ry. v. Henderson, 37 Ohio State, 549.

² Kersey v. Kansas City, &c. Rld. 79 Mo. 362 ; Mann v. Delaware, &c. Canal, 91 N. Y. 495 ; Moss v. Pacific Rld. 49 Mo. 167 ; Brothers v. Cartter, 52 Mo. 372 ; Crew v. St. Louis, &c. Ry. 20 Fed. Rep. 87 ; Davis v. Detroit, &c. Rld. 20 Mich. 105 ; Newell v. Ryan, 40 Hun, 286 ; Indiana Manuf. Co. v. Millican, 87 Ind. 87 ; Chicago, &c. Rld. v. Sullivan, 63 Ill. 293 ; Poirier v. Carroll, 35 La. An. 699 ; Texas Mex. Ry. v. Whitmore, 58 Texas, 276 ; Houston, &c. Ry. v. Myers, 55 Texas,

110 ; Baltimore Elev. Co. v. Neal, 65 Md. 438 ; Harper v. Indianapolis, &c. Rld. 47 Mo. 567 ; Summerhays v. Kansas Pac. Ry. 2 Colo. 484 ; Harper v. Indianapolis, &c. Rld. 44 Mo. 488.

³ Bunnell v. St. Paul, &c. Ry. 29 Minn. 305.

⁴ Mann v. Delaware, &c. Canal, 91 N. Y. 495. See Pittsburgh, &c. Ry. v. Henderson, 37 Ohio State, 549 ; Cooper v. Milwaukee, &c. Ry. 23 Wis. 668.

⁵ Ante, § 653 ; Hiltz v. Chicago, &c. Ry. 55 Mich. 437 ; Stafford v. Chicago, &c. Rld. 114 Ill. 244 ; Probst v. Delamater, 100 N. Y. 266.

servant cannot complain of it.¹ If he was competent and of good habits when employed, the master will not be chargeable by reason of a subsequent deterioration, unless he has notice of it, or something to put him on inquiry.²

§ 656. *Delegating this Duty.* — The duty now in contemplation pertains to the safe management of the business. And though the master may commit it to another if he will take the risk, he will be responsible for the agent's negligence therein, the same as for his own; the case being within explanations made elsewhere in this sub-title.³

§ 657. *Not in Fact Assigned:* —

General. — Whether a particular duty is assignable or not, if in fact the master has not assigned it, but has undertaken to discharge it in person, he will be liable for his neglects therein,⁴ but not for the inevitable.⁵

III. *The Master's Assignable Duties.*

§ 658. **The Rule** — as to this class of duties is, that, if the master has exercised due care in selecting the person to whom he intrusts them,⁶ he is not responsible to a servant injured through such person's neglects. The familiar illustration of this proposition is that, if a fellow servant carefully chosen by the master is negligent of some duty committed to him, the master is not answerable for an injury resulting to another servant.⁷ Now, —

§ 659. **What the Assignable.** — In the last sub-title are

¹ Corson v. Maine Cent. Rld. 76 Maine, 244.

² Chapman v. Erie Ry. 55 N. Y. 579; Michigan Cent. Rld. v. Gilbert, 46 Mich. 176; Huffman v. Chicago, &c. Ry. 78 Mo. 50.

³ Ante, § 647, 648, 650, 651; Mann v. Delaware, &c. Canal, 91 N. Y. 495; Bunnell v. St. Paul, &c. Ry. 29 Minn. 305; Pittsburgh, &c. Ry. v. Henderson, 37 Ohio State, 549.

⁴ Lorentz v. Robinson, 61 Md. 64; Ormond v. Holland, Ellis, B. & E. 102; Ashworth v. Stanwix, 3 Ellis & E. 701.

⁵ Baldwin v. St. Louis, &c. Ry. 68 Iowa, 37; Whitelaw v. Memphis, &c. Rld. 16 Lea, 391.

⁶ Ante, § 653-655.

⁷ Ante, § 639, a matter to be more fully explained in subsequent sub-titles; Loughlin v. The State, 105 N. Y. 159; Pennsylvania Rld. v. Wachter, 60 Md. 395; Yeomans v. Contra Costa Steam Nav. Co. 44 Cal. 71; Kansas Pac. Ry. v. Salmon, 11 Kan. 83; Bogard v. Louisville, &c. Ry. 100 Ind. 491.

enumerated various duties of the master not assignable. Concerning those there specified, there are no great differences of judicial opinion. So likewise there are other duties agreed by all to be assignable.¹ But between these two classes, as to which opinions concur, lie many duties which some place on one side of the line and others on the other.² We shall consider them in the next sub-title. It is but a truism to say that, wherever we draw the line, those duties which are not of the non-assignable class belong to the assignable.

§ 660. **How the Assigning.**—From the nature of a duty it can be assigned only by putting its care into the hands of another person. And whenever the master does this, as to any one of his duties, he constitutes such person his servant. And then this servant and his other servants are, in ordinary law language, termed fellow servants. If, by an attempt to assign a non-assignable duty, or by any other form of proceeding, the performance of it is committed by the master to any person, such person is variously designated; as, for example, vice-principal,³ which term is perhaps the most perspicuous of those in common use. In the next sub-title will be given such further explanations as the space which the author can spare and the nature of the subject permit.

IV. *The Master's Substitutes and Agents.*

§ 661. **Vice-principal**—is the name which we have selected, out of several in use, to indicate the agent whom the master has substituted for himself to discharge his non-assignable duties.⁴

§ 662. **Fellow Servant**—is the term universally employed to denote the assignee of the assignable duties. Now,—

§ 663. **Will of Master.**—In the nature of the case, the question whether a particular agent shall be a vice-principal or

¹ That is, "by every court which decides according to the principles of the common law." Gilfillan, C. J. in *Brown v. Winona, &c.* Rld. 27 Minn. 162, 163. S. C. 526, 528; *Brown v. Sennett*, 68 Cal. 225, 230.

² *Dwyer v. American Exp.* 55 Wis. 453; *Hoke v. St. Louis, &c. Ry.* 88 Mo. 360.

³ *Calvo v. Charlotte, &c.* Rld. 23

⁴ Ante, § 660.

fellow servant cannot depend on the will of the master or on the terms of the appointment.¹ If it could, the master would make the law. Thus,—

§ 664. **Same Person both Vice-principal and Fellow Servant.**—If the duties of a master's agent are in part of the non-assignable sort and in part of the assignable, he will be as to the former a vice-principal and as to the latter a fellow servant.²

§ 665. **Rule to distinguish — (Differences).**—It being settled, therefore, that the question whether a particular employee is a vice-principal or a fellow servant depends on the nature of his duties, the next step in the inquiry is to find a rule by which to distinguish the two classes of duties from each other. And here we have reached the door to discords admittedly irreconcilable. The conflicts of judicial opinion may not be great in a particular State, but there is no precisely uniform American doctrine.³ Looking, however, at the

¹ *Corcoran v. Holbrook*, 59 N. Y. 517; *Mitchell v. Robinson*, 80 Ind. 281; *Gravelle v. Minneapolis, &c. Ry.* 3 McCrary, 352; *Quinn v. New Jersey Lighterage Co.* 23 Fed. Rep. 363; *Baltimore, &c. Rld. v. McKenzie*, 81 Va. 71.

² *Brick v. Rochester, &c. Rld.* 98 N. Y. 211, 216.

³ This work is written on the supposition that each reader has before him the statutes and decisions of his own State, and that he will consult them. Indeed, no writer could produce within reasonable limits any reliable text-book upon any other plan. Each State has its peculiarities of legislation and adjudication. If it were possible, as it is not, for an author to be familiar with all these in every State, still he would be unable to explain them in a way convenient for use in every one; because the matter for a particular State must stand as a part of the then superfluous matter pertaining to other States. At the present point of the inquiry in the text, however, I think it may be convenient for the reader to be referred

to some of the more recent cases in particular States, relating to the present question. Those which I am to cite are not all the cases, but it is believed that those which they refer to will sufficiently supply the omissions. Thus,—

United States.—*Northwestern Packet Co. v. McCue*, 17 Wal. 508; *Union Pac. Rld. v. Fort*, 17 Wal. 553; *Baltimore, &c. Rld. v. Jones*, 95 U. S. 439; *Hough v. Texas, &c. Ry.* 100 U. S. 213; *Wabash Ry. v. McDaniels*, 107 U. S. 454; *Randall v. Baltimore, &c. Rld.* 109 U. S. 478; *Armour v. Hahn*, 111 U. S. 313; *Chicago, &c. Ry. v. Ross*, 112 U. S. 377; *Northern Pac. Rld. v. Herbert*, 116 U. S. 642; *Cunard Steamship Co. v. Carey*, 119 U. S. 245; *Chicago, &c. Ry. v. McLaughlin*, 119 U. S. 566; *Tuttle v. Detroit, &c. Ry.* 122 U. S. 189; *Van Wickle v. Manhattan Ry.* 23 Blatch. 422; *Buckley v. Gould, &c. Min. Co.* 14 Fed. Rep. 833, 8 Saw. 394; *Miller v. Union Pac. Ry.* 17 Fed. Rep. 67; *Thompson v. Chicago, &c. Ry.* 18 Fed. Rep. 239; *Daub v. Northern Pac. Ry.* 18 Fed. Rep. 625; *Gilmore v. Northern Pac.*

general course of our American adjudication, and considering the principles on which the question depends, we may

Ry. 18 Fed. Rep. 866; *Quinn v. New Jersey Lighterage Co.* 23 Fed. Rep. 363; *The Titan*, 23 Fed. Rep. 413; *Garrahy v. Kansas City*, &c. Rld. 25 Fed. Rep. 258; *Howard v. Denver*, &c. Ry. 26 Fed. Rep. 837; *The Furnessia*, 30 Fed. Rep. 878; *Missouri Pac. Ry. v. Texas*, &c. Ry. 31 Fed. Rep. 527; *Yager v. Atlantic*, &c. Rld. 4 Hughes, 192; *Ross v. Chicago*, &c. Ry. 2 McCrary, 235; *Gravelle v. Minneapolis*, &c. Ry. 3 McCrary, 352; *Kielley v. Belcher*, &c. Min. Co. 3 Saw. 437; *Halverson v. Nisen*, 3 Saw. 562; *The Clatsop Chief*, 7 Saw. 274.

Alabama. — *Mobile*, &c. Rld. v. *Thomas*, 42 Ala. 672; *Alabama*, &c. Rld. v. *Waller*, 48 Ala. 459.

Arkansas. — *Fones v. Phillips*, 39 Ark. 17; *St. Louis*, &c. Ry. v. *Shackelford*, 42 Ark. 417; *St. Louis*, &c. Ry. v. *Harper*, 44 Ark. 524; *St. Louis*, &c. Ry. v. *Gaines*, 46 Ark. 555.

California. — *Collier v. Steinhart*, 51 Cal. 116; *McLean v. Blue Point Gravel Min. Co.* 51 Cal. 255; *Beeson v. Green Mountain Gold Min. Co.* 57 Cal. 20; *McKune v. California Southern Rld.* 66 Cal. 302; *Brown v. Sennett*, 68 Cal. 225. In the last cited case, *McKee, J.* stated the rule in this State, as approved in *Beeson v. Green Mountain Gold Min. Co.*, supra, to be: "One to whom his employer commits the entire charge of the business, with power to choose his own assistants, and to control and discharge them as freely and fully as the principal himself could, is not a fellow servant with those employed under him; and the master is answerable to all the under-servants for the negligence of such managing assistant, either in his personal conduct within the scope of his employment, or in his selection of other servants." He deems this rule to accord with most of the American authorities, not all. But the reader will observe that it does not cover the entire controverted ground.

Colorado. — *Atchison*, &c. Rld. v. *Farrow*, 6 Colo. 498.

Connecticut. — *Wilson v. Willimantic Linen Co.* 50 Conn. 433; *Darrigan v. New York*, &c. Rld. 52 Conn. 285; *Zeigler v. Danbury*, &c. Rld. 52 Conn. 543.

Georgia. — There is in this State a statute affecting the question. *Georgia Rld. &c. Co. v. Goldwire*, 56 Ga. 196; *Georgia Rld. &c. Co. v. Rhodes*, 56 Ga. 645; *McDonald v. Eagle*, &c. Manuf. Co. 67 Ga. 761; *Rankin v. Merchants*, &c. Transp. Co. 73 Ga. 229; *Georgia Rld. v. Ivey*, 73 Ga. 499.

Illinois. — *Chicago*, &c. Rld. v. *Keefe*, 47 Ill. 108; *Chicago*, &c. Rld. v. *Murphy*, 53 Ill. 336; *Ryan v. Chicago*, &c. Ry. 60 Ill. 171; *St. Louis*, &c. Ry. v. *Britz*, 72 Ill. 256; *Toledo*, &c. Ry. v. *Moore*, 77 Ill. 217; *Toledo*, &c. Ry. v. *Ingraham*, 77 Ill. 309; *Chicago*, &c. Rld. v. *May*, 108 Ill. 288; *Chicago*, &c. Rld. v. *Geary*, 110 Ill. 383; *North Chicago Rolling Mill v. Johnson*, 114 Ill. 57; *Shedd v. Moran*, 10 Bradw. 618; *Chicago*, &c. Rld. v. *Simmons*, 11 Bradw. 147; *Chicago*, &c. Rld. v. *Bragonier*, 11 Bradw. 516; *Chicago*, &c. Rld. v. *O'Bryan*, 15 Bradw. 134; *Lincoln Coal Min. Co. v. McNally*, 15 Bradw. 181; *North Chicago Rolling Mills v. Benson*, 18 Bradw. 194; *Starne v. Schlothane*, 21 Ill. App. 97; *Chicago*, &c. Rld. v. *McDonald*, 21 Ill. App. 409.

Indiana. — *Columbus*, &c. Ry. v. *Arnold*, 31 Ind. 174; *Robertson v. Terre Haute*, &c. Rld. 78 Ind. 77; *Mitchell v. Robinson*, 80 Ind. 281; *Turner v. Indianapolis*, 96 Ind. 51; *Brazil*, &c. Coal Co. v. *Cain*, 98 Ind. 282; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Pittsburgh*, &c. Ry. v. *Kirk*, 102 Ind. 399; *Capper v. Louisville*, &c. Ry. 103 Ind. 305; *Lake Shore*, &c. Ry. v. *Stupak*, 108 Ind. 1.

Iowa. — There is in this State a statute affecting the question. *Hamil-*

deem the true rule to be, that, as between master and servant, the duty of planning a business, and all duties pertaining to

ton v. Des Moines Valley Rld. 36 Iowa, 31; McKnight v. Iowa, &c. Rld. Const. Co. 43 Iowa, 406; First Nat. Bank v. Davies, 43 Iowa, 424; Smith v. Burlington, &c. Ry. 59 Iowa, 73; Houser v. Chicago, &c. Ry. 60 Iowa, 230; Troughear v. Lower Vein Coal Co. 62 Iowa, 576; Foley v. Chicago, &c. Ry. 64 Iowa, 644; Malone v. Burlington, &c. Ry. 65 Iowa, 417; Luce v. Chicago, &c. Ry. 67 Iowa, 75; Matson v. Chicago, &c. Ry. 68 Iowa, 22; Stroble v. Chicago, &c. Ry. 70 Iowa, 555.

Kansas. — In this State there is a statute more or less influencing the question. Atchison, &c. Rld. v. Moore, 31 Kan. 197; Hannibal, &c. Rld. v. Fox, 31 Kan. 586; Missouri Pac. Ry. v. Mackey, 33 Kan. 298; Union Pac. Ry. v. Harris, 33 Kan. 416; St. Louis, &c. Ry. v. Weaver, 35 Kan. 412; Missouri, Pac. Ry. v. Dwyer, 36 Kan. 58.

Kentucky. — Louisville, &c. Rld. v. Filbern, 6 Bush, 574.

Louisiana. — Satterly v. Morgan, 35 La. An. 1166; Wallis v. Morgan's La. &c. Co. 38 La. An. 156.

Maine. — Lawler v. Androscoggin Rld. 62 Maine, 463; Mayhew v. Sullivan Min. Co. 76 Maine, 100; Doughty v. Penobscot Log Driv. Co. 76 Maine, 143; Cassidy v. Maine Cent. Rld. 76 Maine, 488; Conley v. Portland, 78 Maine, 217.

Maryland. — Wonder v. Baltimore, &c. Rld. 32 Md. 411; Cumberland, &c. Rld. v. The State, 44 Md. 283, 45 Md. 229; Baltimore Elev. Co. v. Neal, 65 Md. 438.

Massachusetts. — Avilla v. Nash, 117 Mass. 318; Johnson v. Boston, 118 Mass. 114; Wood v. New Bedford Coal Co. 121 Mass. 252; McDermott v. Boston, 133 Mass. 349; Flynn v. Salem, 134 Mass. 351; Elmer v. Locke, 135 Mass. 575; Osborne v. Morgan, 137 Mass. 1; Clifford v. Old Colony Rld. 141 Mass. 564; Rogers v. Ludlow Manuf. Co. 144 Mass. 198, 203, where

Field, J. said: "It is settled in this Commonwealth that all servants employed by the same master in a common service are fellow servants, whatever may be their grade and rank." In *Elmer v. Locke*, supra, at p. 577, Devens, J. observed: "While it is well settled that, if a master uses reasonable care in the selection of his servants, and in supplying and keeping in repair suitable structures, and in giving proper directions and taking due precautions as to their use, he is not responsible to one servant for the negligence of another in the management and use of such structures in carrying on the master's work, it is equally clear that he is bound to use reasonable care to keep the engines with which, and the buildings, places and structures in, upon, or over which, his business is carried on, in a fit and safe condition, and that he is liable to any of his servants for injuries suffered by reason of his negligence. Nor can he escape responsibility where it is his duty to supply suitable structures, instrumentalities, or appliances, by proving that he delegated to a proper agent their construction, superintendence, or repair."

Michigan. — Smith v. Potter, 46 Mich. 258; Ryan v. Bagaley, 50 Mich. 179; James v. Emmet Min. Co. 55 Mich. 335.

Minnesota. — Foster v. Minnesota Cent. Ry. 14 Minn. 360; Brown v. Winona, &c. Rld. 27 Minn. 162; Collins v. St. Paul, &c. Rld. 30 Minn. 31; Brown v. Minneapolis, &c. Ry. 31 Minn. 553; Fraker v. St. Paul, &c. Ry. 32 Minn. 54; Roberts v. Chicago, &c. Ry. 33 Minn. 218; Tierney v. Minneapolis, &c. Ry. 33 Minn. 311; Kelly v. Erie Telegraph, &c. Co. 34 Minn. 321; Olson v. St. Paul, &c. Ry. 34 Minn. 477; Macy v. St. Paul, &c. Rld. 35 Minn. 200.

Mississippi. — New Orleans, &c. Rld. v. Hughes, 49 Missis. 258; Memphis,

the safety¹ of the service, — such as the place to work, the implements and machinery, the plans and rules after which

&c. *Rld. v. Thomas*, 51 Missis. 637 ; *Chicago, &c. Rld. v. Doyle*, 60 Missis. 977 ; *Louisville, &c. Rld. v. Conroy*, 63 Missis. 562.

Missouri. — *Gormly v. Vulcan Iron Works*, 61 Mo. 492 ; *Marshall v. Schricker*, 63 Mo. 308 ; *Hall v. Missouri Pac. Ry.* 74 Mo. 298 ; *Blessing v. St. Louis, &c. Ry.* 77 Mo. 410 ; *Condon v. Missouri Pac. Ry.* 78 Mo. 567 ; *Renfro v. Chicago, &c. Ry.* 86 Mo. 302 ; *McDermott v. Hannibal, &c. Rld.* 87 Mo. 285 ; *Hoke v. St. Louis, &c. Ry.* 88 Mo. 360 ; *Clowers v. Wabash, &c. Rld.* 21 Mo. Ap. 213 ; *Dutzi v. Geisel*, 23 Mo. Ap. 676 ; *Corbett v. St. Louis, &c. Ry.* 26 Mo. Ap. 621.

Nebraska. — *Chicago, &c. Ry. v. Lundstrom*, 16 Neb. 254 ; *Burlington, &c. Rld. v. Crockett*, 19 Neb. 138.

New Jersey. — *Ewan v. Lippincott*, 18 Vroom, 192.

New York. — *Svenson v. Atlantic Mail Steams. Co.* 57 N. Y. 108 ; *Corcoran v. Holbrook*, 59 N. Y. 517 ; *Malone v. Hathaway*, 64 N. Y. 5 ; *Slater v. Jewett*, 85 N. Y. 61 ; *Sheehan v. New York Cent. &c. Rld.* 91 N. Y. 332 ; *Vick v. New York Cent. &c. Rld.* 95 N. Y. 267 ; *Benzing v. Steinway*, 101 N. Y. 547 ; *Loughlin v. The State*, 105 N. Y. 159 ; *Hart v. New York Float. Dry Dock Co.* 48 N. Y. Super. 460 ; *Kenny v. Cunard Steams. Co.* 52 N. Y. Super. 434 ; *Henry v. Brady*, 9 Daly, 142 ; *Pickett v. Atlas Steams. Co.* 12 Daly, 441 ; *Stringham v. Steuart*, 64 How. Pr. 5, 27 Hun, 562 ; *Beilfus v. New York, &c. Ry.* 29 Hun, 556 ; *Olson v. Clyde*, 32 Hun, 425 ; *Scott v. Sweeney*, 34 Hun, 292 ; *Hussey v. Coger*, 39 Hun, 639 ; *Murphy v. New*

York Cent. &c. Rld. 44 Hun, 242 ; *Sullivan v. Tioga Rld.* 44 Hun, 304 ; *In Loughlin v. The State*, supra, at p. 162, *Andrews, J.* stated it to be the settled doctrine of the State that "the liability of the master, when the negligence was not his personal act or omission, but the immediate act or omission of a servant, turns upon the character of the act ;" that is, what we have seen (ante, § 663) to be necessarily the universal doctrine is well established by authority in New York. He proceeds : "If the co-servant whose act caused the injury, was at the time representing the master in doing the master's duty, the master is liable ; if, on the other hand, he was simply performing the work of a servant, in his character as a servant or employee merely, the master is not liable. The injury in the case last supposed would, as between the master and the servant sustaining the injury, be attributable solely to the immediate author and not to the master. In harmony with the general principle that the character of the act is the decisive test, it has been repeatedly decided in this court that the fact that the person whose negligence caused the injury was a servant of a higher grade than the servant injured, or that the latter was subject to the direction or control of the former, and was engaged at the time in executing the orders of the former, does not take the case out of the operation of the general rule, nor make the master liable."

North Carolina. — *Hardy v. Carolina, &c. Ry.* 76 N. C. 5 ; *Kirk v. Atlanta, &c. Ry.* 94 N. C. 625 ; *Patton v. Western N. C. Rld.* 96 N. C. 455.

¹ *Burlington, &c. Rld. v. Crockett*, 19 Neb. 138 ; *Dick v. Indianapolis, &c. Rld.* 38 Ohio State, 389 ; *Ardesco Oil Co. v. Gilson*, 13 Smith, Pa. 146 ; *Madden v. Chesapeake, &c. Ry.* 28 W. Va. 610 ; *Lake Shore, &c. Ry. v. Lavalley*,

36 Ohio State, 221 ; *James v. Emmet Min. Co.* 55 Mich. 335, 345 ; *Sheehan v. New York Cent. &c. Rld.* 91 N. Y. 332 (compare with *Slater v. Jewett*, 85 N. Y. 61).

the work is to be conducted, the choosing of the fellow servants, and whatever else is within the same reason, — must be discharged either by the master in person, or by a vice-

Ohio. — *Pittsburgh, &c. Ry. v. Ranney*, 37 Ohio State, 665; *Dick v. Indianapolis, &c. Rld.* 38 Ohio State, 389; *Little Miami Rld. v. Fitzpatrick*, 42 Ohio State, 318.

Oregon. — *Willis v. Oregon Ry. &c. Co.* 11 Oregon, 257.

Pennsylvania. — *Ardesco Oil Co. v. Gilson*, 13 Smith, Pa. 146; *Baird v. Pettit*, 20 Smith, Pa. 477; *Mullan v. Philadelphia, &c. Steams. Co.* 28 Smith, Pa. 25; *National Tube Works v. Bedell*, 15 Norris, Pa. 175; *Keystone Bridge v. Newberry*, 15 Norris, Pa. 246; *Reading Iron Works v. Devine*, 13 Out. Pa. 246; *Reese v. Biddle*, 2 Am. Pa. 72; *Johnston v. Pittsburgh, &c. Rld.* 4 Am. Pa. 443; *Mullen v. Steamship Co.* 9 Philad. 16. In *Keystone Bridge v. Newberry*, supra, a head-note states: "To constitute fellow servants, the employees need not at the same time be engaged in the same particular work. It is sufficient if they are in the employment of the same master, engaged in the same common work and performing duties and services for the same general purpose. The rule is the same, although the one injured may be inferior in grade, and is subject to the direction and control of the superior whose act caused the injury, provided they are both co-operating to effect the same common object."

South Carolina. — *Gunter v. Graniteville Manuf. Co.* 15 S. C. 443; *Gunter v. Graniteville Manuf. Co.* 18 S. C. 262; *Lasure v. Graniteville Manuf. Co.* 18 S. C. 275; *Calvo v. Charlotte, &c. Rld.* 23 S. C. 526. In the last of these cases, *McIver, J.*, at p. 528, states that, to ascertain whether a given employee is vice-principal or fellow servant, the adjudications of this State have settled "the true test" to be, "whether the person in question is employed to do any of the duties of the master; if so,

then he cannot be regarded as a fellow servant or co-laborer with the operatives, but is the representative of the master, and any negligence on his part in the performance of the duty of the master thus delegated to him, must be regarded as the negligence of the master." The first of the above cited cases contains an interesting history of this department of the law of master and servant, by *Simpson, C. J.*

Tennessee. — *Nashville, &c. Rld. v. Carroll*, 6 Heisk. 347; *Nashville, &c. Rld. v. Wheless*, 10 Lea, 741; *East Tennessee, &c. Rld. v. Gurley*, 12 Lea, 46; *Nashville, &c. Rld. v. McDaniel*, 12 Lea, 386; *East Tennessee, &c. Rld. v. Collins*, 85 Tenn. 227.

Texas. — *Houston, &c. Ry. v. Marcelles*, 59 Texas, 334; *Texas, &c. Ry. v. Harrington*, 62 Texas, 597; *Galveston, &c. Ry. v. Faber*, 63 Texas, 344; *Douglas v. Texas Mex. Ry.* 63 Texas, 564; *Eason v. Sabine, &c. Ry.* 65 Texas, 577.

Virginia. — *Moon v. Richmond, &c. Rld.* 78 Va. 745; *Baltimore, &c. Rld. v. McKenzie*, 81 Va. 71.

West Virginia. — *Cooper v. Pittsburgh, &c. Ry.* 24 W. Va. 37; *Riley v. West Virginia Cent. &c. Ry.* 27 W. Va. 145; *Madden v. Chesapeake, &c. Ry.* 28 W. Va. 610.

Wisconsin. — *Brabbitts v. Chicago, &c. Ry.* 38 Wis. 289; *Hoth v. Peters*, 55 Wis. 405; *Dwyer v. American Exp.* 55 Wis. 453; *Pool v. Chicago, &c. Ry.* 56 Wis. 227; *Heine v. Chicago, &c. Ry.* 58 Wis. 525; *Luebke v. Chicago, &c. Ry.* 59 Wis. 127; *Fowler v. Chicago, &c. Ry.* 61 Wis. 159; *Pease v. Chicago, &c. Ry.* 61 Wis. 163; *Mathews v. Case*, 61 Wis. 491; *Peschel v. Chicago, &c. Ry.* 62 Wis. 338; *Kelly v. Abbot*, 63 Wis. 307; *Phillips v. Chicago, &c. Ry.* 64 Wis. 475; *Mulcairns v. Janesville*, 67 Wis. 24; *Schultz v. Chicago, &c. Ry.* 67 Wis. 616.

principal for whose neglects and other wrongs therein he will be responsible as for his own.¹ On the other side, the running of the business, with and in pursuance of the plans, rules, appliances, helps, and helpers thus provided, — in other words, the execution of the work, — is of the assignable sort, rendering all persons engaged therein fellow servants; so that, if the master used due care in selecting his servants, he will not be responsible to one for an injury produced by the negligence or other default of another.² In connection with the explanations already given in this chapter, let us here add some particulars, not attempting to enumerate all. Thus, —

§ 666. **Supervision — (Superior and Inferior).** — After a master has taken upon himself the responsibilities thus stated to be his own, it has become physically impossible for him, even if he employs no more than a single servant, to stand constantly by the servant's side and impel every motion by the superior will. Therefore to require of him this impossibility, on pain of being mulcted in damages for every injury inflicted by his carefully chosen servant on another, would take from him the right to live, as interpreted by the common law.³ Then, where there are many servants co-operating to an end, each gang must have its directing mind, commonly called a foreman. By the side of each foreman the master cannot personally stand, giving orders to be simply repeated; therefore it follows from our reasoning that the foreman is a fellow servant and not a vice-principal. And so are most of the judicial authorities;⁴ but some dissent, deeming the relation of supe-

¹ Ante, § 639, 643-656.

² Compare with ante, § 639.

³ Ante, § 637-639, and places there referred to.

⁴ *Hoth v. Peters*, 55 Wis. 405; *Brown v. Winona, &c.* Rld. 27 Minn. 162; *Willis v. Oregon Ry. &c. Co.* 11 Oregon, 257; *Reese v. Biddle*, 2 Am. Pa. 72; *Collier v. Steinhart*, 51 Cal. 116; *McLean v. Blue Point Gravel Min. Co.* 51 Cal. 255; *O'Connor v. Roberts*, 120 Mass. 227; *Marshall v. Schricker*, 63 Mo. 308; *Malone v. Hathaway*, 64 N. Y. 5; *Flynn v. Salem*, 134 Mass.

351; *Conley v. Portland*, 78 Maine, 217; *Cassidy v. Maine Cent. Rld.* 76 Maine, 488; *McDermott v. Boston*, 133 Mass. 349; *Wonder v. Baltimore, &c. Rld.* 32 Md. 411; *Mathews v. Case*, 61 Wis. 491; *Peschel v. Chicago, &c. Ry.* 62 Wis. 338 (see *Mulcairns v. Janesville*, 67 Wis. 24); *Doughty v. Penobscot Log Driv. Co.* 76 Maine, 143; *Chicago, &c. Rld. v. Murphy*, 53 Ill. 336; *Feltham v. England*, Law Rep. 2 Q. B. 33; *Nashville, &c. Rld. v. Wheless*, 10 Lea, 741.

rior and subordinate to make the superior a vice-principal.¹ Still, —

§ 667. **Performing Master's Duties.** — Consistently with the better doctrine thus stated, whenever any servant, whether known by the name of servant, foreman, laborer, or any other, is executing any of the non-assignable duties of the master, he thereby becomes a vice-principal as to them, though he may be also a fellow servant as to other duties.² Of this sort, for example, is a road-master of a railroad, culpably negligent in keeping it in repair; he is a vice-principal.³ So the negligence of a superintendent of a cotton factory, whose duty it is to keep the machinery in repair, is the negligence of the owners; in other words, he is a vice-principal.⁴ And an agent purchasing a locomotive is a vice-principal, not a fellow servant with those who operate the railroad.⁵

§ 668. **Employ and Discharge.** — Following still this reasoning, the agent who employs and discharges servants is, while doing it, a vice-principal; but, in respect of other duties, he may be a fellow servant with those employed. Whether he is the one or the other will depend on whether the duties are of the assignable or non-assignable sort. Looking to the decisions, we do not find them very enlightening on this question.⁶

¹ *Pittsburgh, &c. Ry. v. Lewis*, 33 Ohio State, 196, 200; *Pittsburgh, &c. Ry. v. Ranney*, 37 Ohio State, 665, 669; *Lake Shore, &c. Ry. v. Lavalley*, 36 Ohio State, 221; *McDermott v. Hannibal, &c. Rld.* 87 Mo. 285.

² *Ante*, § 663, 664; *Hannibal, &c. Rld. v. Fox*, 31 Kan. 586; *St. Louis, &c. Ry. v. Harper*, 44 Ark. 524, 530, 531; *Fones v. Phillips*, 39 Ark. 17; *Benzing v. Steinway*, 101 N. Y. 547; *Chicago, &c. Rld. v. May*, 108 Ill. 288; *Gilmore v. Northern Pac. Ry.* 18 Fed. Rep. 866; *Madden v. Chesapeake, &c. Ry.* 28 W. Va. 610; *Riley v. West Virginia Cent. &c. Ry.* 27 W. Va. 145; *Moon v. Richmond, &c. Rld.* 78 Va. 745; *Douglas v. Texas Mex. Ry.* 63 Texas, 564.

³ *Atchison, &c. Rld. v. Moore*, 31 Kan. 197. And see *Cooper v. Pitts-*

burgh, &c. Ry. 24 W. Va. 37; *Houston, &c. Ry. v. Marcelles*, 59 Texas, 334; *Hall v. Missouri Pac. Ry.* 74 Mo. 298; *Macy v. St. Paul, &c. Rld.* 35 Minn. 200; *Tierney v. Minneapolis, &c. Ry.* 33 Minn. 311; *Smith v. Potter*, 46 Mich. 258; *St. Louis, &c. Ry. v. Gaines*, 46 Ark. 555.

⁴ *Gunter v. Graniteville Manuf. Co.* 18 S. C. 262; *Lasure v. Graniteville Manuf. Co.* 18 S. C. 275. Compare with *National Tube Works v. Bedell*, 15 Norris, Pa. 175. And see *Kelly v. Erie Telegraph, &c. Co.* 34 Minn. 321; *Indiana Car Co. v. Parker*, 100 Ind. 181.

⁵ *Cumberland, &c. Rld. v. The State*, 44 Md. 283, 45 Md. 229.

⁶ See, for example, *Miller v. Union Pac. Ry.* 17 Fed. Rep. 67; *Ryan v. Bagaley*, 50 Mich. 179; *McKune v.*

§ 669. **Servants working Together or Apart.** — We have judicial expressions indicating that, to constitute fellow servants, they must be working together in the same shop or place, or in some way under one another's observation.¹ The foregoing reasoning shows that this is not the better doctrine in principle. And it is contrary to the general current of authority.²

V. *Fellow Servants.*

§ 670. **Who are** — fellow servants is explained in the subtitle just closed. And the general doctrine as to the master's liability to them has been already stated incidentally; namely, —

§ 671. **Doctrine defined.** — A master who has exercised the care incumbent on him in planning and laying out his business, and in providing for his servants proper appliances and a proper place to work, is not answerable to a servant whom he has adequately instructed for any injury proceeding from the negligence or other wrong of a fellow servant, in whose selection for the service he was duly careful.³ Thus, —

California Southern Rld. 66 Cal. 302; Gormly v. Vulcan Iron Works, 61 Mo. 492; Brabbits v. Chicago, &c. Ry. 38 Wis. 289; Patton v. Western N. C. Rld. 96 N. C. 455.

¹ Moon v. Richmond, &c. Rld. 78 Va. 745; North Chicago Rolling Mill v. Johnson, 114 Ill. 57; Toledo, &c. Ry. v. O'Connor, 77 Ill. 391; Chicago, &c. Rld. v. Keefe, 47 Ill. 108. See Chicago, &c. Ry. v. Ross, 112 U. S. 377.

² Gilman v. Eastern Rld. 10 Allen, 233, 236; Foster v. Minnesota Cent. Ry. 14 Minn. 360; Mobile, &c. Rld. v. Thomas, 42 Ala. 672; Chicago, &c. Rld. v. Doyle, 60 Missis. 977; Morgan v. Vale of Neath Ry. Law Rep. 1 Q. B. 149; Wonder v. Baltimore, &c. Rld. 32 Md. 411; New York, &c. Rld. v. Bell, 2 Am. Pa. 400, and multitudes of other cases.

³ Ante, § 639, 651, 658, 665; Price v. Houston Direct Nav. Co. 46 Texas,

535, where great numbers of cases are collected and examined; Randall v. Baltimore, &c. Rld. 109 U. S. 478, also examining many cases; Pease v. Chicago, &c. Ry. 61 Wis. 163; Fowler v. Chicago, &c. Ry. 61 Wis. 159; Renfro v. Chicago, &c. Ry. 86 Mo. 302; Satterly v. Morgan, 35 La. An. 1166; Indianapolis, &c. Ry. v. Johnson, 102 Ind. 352; Brazil, &c. Coal Co. v. Cain, 98 Ind. 282; McDonald v. Eagle, &c. Manuf. Co. 67 Ga. 761, 68 Ga. 839; Atchison, &c. Rld. v. Farrow, 6 Colo. 498; Dow v. Kansas Pac. Ry. 8 Kan. 642; Union Pac. Ry. v. Milliken, 8 Kan. 647; Union Pac. Ry. v. Young, 8 Kan. 658; Laning v. New York Cent. Rld. 49 N. Y. 521; Michigan Cent. Rld. v. Dolan, 32 Mich. 510; Mercer v. Jackson, 54 Ill. 397; Bull v. Mobile, &c. Rld. 67 Ala. 206; Floyd v. Sugden, 134 Mass. 563; Kevern v. Providence Gold, &c. Min. Co. 70 Cal. 392; Anderson v. Milwaukee, &c. Ry. 37 Wis. 321;

§ 672. **To Distinguish.** — If a railroad servant is injured because there is no headlight, the road is responsible; if because the headlight is not lit, it is not responsible. For the former neglect is of a non-assignable duty of the master's; the latter, is of a duty properly assigned to servants; so that it is the neglect of a fellow servant.¹

§ 673. **Why?** — It is common to derive this doctrine, by judicial interpretation, from the contract of service,² and from what is expedient in the relation of master and servant.³ But whatever we may deem of this reasoning, we have seen that the doctrine more firmly rests in the right to live; which, in our common law, is interpreted to be the liberty of procuring needed sustenance and comforts by constant activity, without liability to persons casually injured thereby, provided this is done with such cautious regard for their interests as the circumstances reasonably permit.⁴ A master who has planned his affairs with due care for the safety of his servants, according to the rules already explained, would, if then bound to each servant to repair all the damage which every other servant did him, be compelled to suffer from what to such master was the inevitable,⁵ contrary to the justice of the common law as thus explained. At all events, the common law being so, the courts have no right to adjudge otherwise in any case, except by command of a statute. We shall see in a subsequent sub-title, that, in a few localities, statutes have modified the doctrine in favor of the servant, — a sort of legislation humane on its face, yet, like other attempts to improve on natural justice, of doubtful utility in its actual workings.

The Islands, 28 Fed. Rep. 478; Hogan v. Central Pac. Rld. 49 Cal. 128; Neilson v. Gilbert, 69 Iowa, 691; Murphy v. Boston, &c. Rld. 88 N. Y. 146; Brazil v. Western N. C. Rld. 93 N. C. 313; Nashville, &c. Ry. v. Handman, 13 Lea, 423; McCosker v. Long Island Rld. 84 N. Y. 77; Anthony v. Leeret, 105 N. Y. 591.

¹ Collins v. St. Paul, &c. Rld. 30 Minn. 31.

² Ante, § 639; Lalor v. Chicago, &c. Rld. 52 Ill. 401; Chicago, &c. Rld. v. Murphy, 53 Ill. 386; Melville v. Missouri River, &c. Rld. 4 McCrary, 194; Gartland v. Toledo, &c. Ry. 67 Ill. 498.

³ Flike v. Boston, &c. Rld. 53 N. Y. 549, 552.

⁴ Ante, § 10, 11, 14, 98, 104, 150, 176-184, 637, 639.

⁵ Ante, § 155 et seq.

VI. *The Servant's Assumptions of Risks and his Contributory Negligence.*

§ 674. **Two Principles.** — In the practical application of the foregoing doctrines, we find them modified by the two principles that, if in words or by implication the servant has undertaken to assume a risk, he cannot have compensation of the master for an injury resulting therefrom; and that, whether so or not, he cannot complain of an accident to which his own negligence contributed, within the doctrine of contributory negligence¹ explained in a preceding chapter. Under the facts of some of the cases, these two principles are together operative, severally in bar of the servant's claim for damages; under those of others, the one or the other principle produces alone the same result. It will here be convenient to look at them separately. Thus, —

§ 675. *Assumptions of Risks:* —

Doctrine defined. — If one, fully cognizant of the risks² of a particular service, voluntarily enters thereon, his undertaking of service is interpreted as an assumption of those risks, and a waiver of any right to complain of an injury therefrom.³ And this rule extends both to the ordinary perils,⁴ and to

¹ Ante, § 458-470.

² The knowledge should extend to the risks, and not simply to the character and condition of unsafe machinery. *Russell v. Minneapolis, &c. Ry.* 32 Minn. 230; *Kelley v. Wilson*, 21 Ill. Ap. 141.

³ *Gibson v. Erie Ry.* 63 N. Y. 449; *Kennedy v. Manhattan Ry.* 33 Hun, 457; *Dowell v. Burlington, &c. Ry.* 62 Iowa, 629; *Dillon v. Union Pac. Rld.* 3 Dil. 319; *Fraker v. St. Paul, &c. Ry.* 32 Minn. 54; *Kenney v. Shaw*, 133 Mass. 501; *Moulton v. Gage*, 138 Mass. 390; *Hathaway v. Michigan Cent. Rld.* 51 Mich. 253; *Bryant v. Burlington, &c. Ry.* 66 Iowa, 305; *Houston, &c. Ry. v. Fowler*, 56 Texas, 452; *Rush v. Missouri Pac. Ry.* 36 Kan. 129; *Brown v. Chicago, &c. Ry.* 69 Iowa, 161;

Spiva v. Osago Coal, &c. Co. 88 Mo. 68; *Hickey v. Taaffe*, 105 N. Y. 26; *Lake Shore, &c. Ry. v. McCormick*, 74 Ind. 440; *Indiana, &c. Ry. v. Dailey*, 110 Ind. 75; *Wabash, &c. Ry. v. Dardorff*, 14 Bradw. 401; *Houston, &c. Ry. v. O'Hare*, 64 Texas, 600; *Schultz v. Chicago, &c. Ry.* 67 Wis. 616; *Louisville, &c. Rld. v. Gower*, 85 Tenn. 465; *Woodworth v. St. Paul, &c. Ry.* 18 Fed. Rep. 282; *Sweeney v. Berlin, &c. Co.* 101 N. Y. 520; *Linch v. Sagamore Manuf. Co.* 143 Mass. 206; *DeForest v. Jewett*, 88 N. Y. 264; *Yeaton v. Boston, &c. Rld.* 135 Mass. 418.

⁴ *Howd v. Mississippi Cent. Rld.* 50 Missis. 178; *Fort Wayne, &c. Rld. v. Gildersleeve*, 33 Mich. 133; *Whittaker v. Coombs*, 14 Bradw. 498; *Michigan Cent. Rld. v. Smithson*, 45 Mich. 212;

those special to an employment which the servant knows to be exceptionally hazardous.¹ And, —

§ 676. *Infant.* — This being a doctrine of waiver,² therefore not requiring a contract valid in law,³ an infant of sufficient actual capacity is bound by it the same as an adult.⁴ Moreover, —

§ 677. *During Employment.* — As an executed waiver never requires a consideration to render it valid,⁵ this doctrine of the assumption of risks applies as well to those which first arise or become known to the servant during the service as to those in contemplation at the original hiring.⁶ Undoubtedly a master who exposes his servant to dangers not within the contract of hiring violates it; but a servant who, on discovering them, neither informs nor protests to the master, nor yet abandons the service, assumes the risks, so that he cannot complain though injury follows.⁷ If, for example, appliances become unsafe in their use, he should notify the master; thereupon, if the latter promises repair, the careful continuing of their use while waiting for it does not ordinarily imply waiver, and the servant may have compensation for any resulting damages.⁸ But this is not necessarily so under all circum-

Coolbroth *v.* Maine Cent. Rld. 77 Maine, 165.

¹ Gibson *v.* Erie Ry. *supra*; Tuttle *v.* Detroit, &c. Ry. 122 U. S. 189; Johnson *v.* Bruner, 11 Smith, Pa. 58; Howland *v.* Milwaukee, &c. Ry. 54 Wis. 226; Kelley *v.* Chicago, &c. Ry. 35 Minn. 490; Brossman *v.* Lehigh Valley Rld. 3 Am. Pa. 490; Chicago, &c. Rld. *v.* Ward, 61 Ill. 130.

² Ante, § 49-53.

³ Bishop Con. § 791, 804, 805.

⁴ McGinnis *v.* Canada Southern Bridge, 49 Mich. 466; Gilbert *v.* Guild, 144 Mass. 601; Schwandner *v.* Birge, 33 Hun, 186; De Graff *v.* New York Cent. &c. Rld. 76 N. Y. 125, 132; Palmer *v.* Harrison, 57 Mich. 182.

⁵ Bishop Con. § 804.

⁶ Hatt *v.* Nay, 144 Mass. 186; Robinson *v.* Houston, &c. Ry. 46 Texas, 540; Toledo, &c. Ry. *v.* Eddy, 72 Ill.

138; St. Louis, &c. Ry. *v.* Britz, 72 Ill. 256; Umbach *v.* Lake Shore, &c. Ry. 83 Ind. 191; Jackson *v.* Kansas City, &c. Rld. 31 Kan. 761; Scott *v.* Oregon Ry. &c. Co. 14 Oregon, 211; Foley *v.* Chicago, &c. Ry. 48 Mich. 622; Moline Plow Co. *v.* Anderson, 19 Bradw. 417; Lawless *v.* Connecticut River Rld. 136 Mass. 1.

⁷ Anderson *v.* Winston, 31 Fed. Rep. 528; Brewer *v.* Flint, &c. Ry. 56 Mich. 620; Naylor *v.* Chicago, &c. Ry. 53 Wis. 661; Galveston, &c. Ry. *v.* Drew, 59 Texas, 10; Money *v.* Lower Vein Coal Co. 55 Iowa, 671; Houston, &c. Ry. *v.* Myers, 55 Texas, 110; Pingree *v.* Leyland, 135 Mass. 398; Atlanta, &c. Ry. *v.* Ray, 70 Ga. 674.

⁸ Flynn *v.* Kansas City, &c. Rld. 78 Mo. 195; Missouri Furnace Co. *v.* Abend, 107 Ill. 44; Sioux City, &c. Rld. *v.* Finlayson, 16 Neb. 578; Greene

stances;¹ as, if, notwithstanding the promise, the danger "was," in the language of Harlan, J. "so imminent or manifest as to prevent a reasonably prudent man from risking it" notwithstanding the promise, the servant's continuing in what is thus plainly dangerous will bar him on the ground of contributory negligence.² And there may be a moral coercion,³ such as a threat to discharge,⁴ which will prevent the waiver from attaching.

§ 678. **Servant not Knowing.** — A servant is justified in relying in some degree on the prudence and caution of the master, who will be presumed to put into his hands only safe appliances.⁵ And the master will be responsible for the consequences of a defect which he knew, but the servant did not.⁶ Or, if the former suddenly orders the latter into a dangerous position not well understood by him, and does not impart the needed instruction, the like responsibility arises.⁷ Ordinarily the servant will be presumed to know what is obvious, or what he has the ready means of knowing;⁸ but, for example, there is no presumption that a brakeman has the skill to determine from an inspection of the brakes their unfitness for use,⁹ or that a laborer shovelling earth at the bottom of a cistern is aware of its negligent construction, rendering it liable to fall on him.¹⁰ On the other hand, it was held that a laborer wheeling earth along the edge of a bank while the frost is coming out presumptively knows the danger of a caving in, therefore assumes the risk.¹¹ There are dangers equally

v. Minneapolis, &c. Ry. 31 Minn. 248; *Union Manuf. Co. v. Morrissey*, 40 Ohio State, 148.

¹ *Marsh v. Chickering*, 101 N. Y. 396.

² *District of Columbia v. McElligott*, 117 U. S. 621, 633.

³ *Chicago, &c. Rld. v. Clark*, 11 Bradw. 104. And see *Fairbank v. Haentzsch*, 73 Ill. 236.

⁴ *Jones v. Lake Shore, &c. Ry.* 49 Mich. 573; *East Tennessee, &c. Rld. v. Duffield*, 12 Lea, 63; *Leary v. Boston, &c. Rld.* 139 Mass. 580.

⁵ *Fort Wayne, &c. Rld. v. Gildersleeve*, 33 Mich. 133; *East Tennessee,*

&c. Rld. v. Duffield, 12 Lea, 63; *Howard Oil Co. v. Farmer*, 56 Texas, 301. And see *Malone v. Morton*, 84 Mo. 436.

⁶ *Behm v. Armour*, 58 Wis. 1; *Malone v. Hawley*, 46 Cal. 409.

⁷ *Pittsburgh, &c. Ry. v. Adams*, 105 Ind. 151.

⁸ *Rasmussen v. Chicago, &c. Ry.* 65 Iowa, 236; *Davis v. Detroit, &c. Rld.* 20 Mich. 105; *Heath v. Whitebreast Coal, &c. Co.* 65 Iowa, 737; *Aldridge v. Midland Blast Furnace Co.* 78 Mo. 559.

⁹ *Central Rld. v. Haslett*, 74 Ga. 59.

¹⁰ *Mulcairns v. Janesville*, 67 Wis. 24.

¹¹ *Olson v. McMullen*, 34 Minn. 94.

known to the master and servant; as to which, the ordinary rule relieves the master of responsibility for an injury resulting to the servant.¹ And still the master must take reasonable care to avoid unnecessary danger,² while yet the servant does not assume the risk of that whereof he has no knowledge.³

§ 679. *The Servant's Contributory Negligence*: —

The General Doctrine — of contributory negligence is explained in a preceding chapter.⁴ It is simply that doctrine, with no special modifications, which governs the present subject. Thus, —

§ 680. **Defined.** — Though the master has not provided safe appliances and suitable fellow servants, or though he is otherwise negligent, yet if the servant is himself negligent in the doing of that from which an injury has resulted to him, he cannot enforce compensation from the master.⁵

¹ Galveston, &c. Ry. v. Lempe, 59 Texas, 19; Gibson v. Erie Ry. 63 N. Y. 449, 453.

² O'Neil v. St. Louis, &c. Ry. 3 McCrary, 423; Palmer v. Denver, &c. Ry. 3 McCrary, 635.

³ Waldhier v. Hannibal, &c. Rld. 87 Mo. 37; Cole v. Chicago, &c. Ry. 67 Wis. 272.

⁴ Ante, § 458-470.

⁵ Cornwall v. Charlotte, &c. Rld. 97 N. C. 11; Lane v. Central Iowa Ry. 69 Iowa, 443; Simmons v. Chicago, &c. Rld. 110 Ill. 340; Kelly v. Union Ry. &c. Co. 11 Mo. Ap. 1; Powers v. New York, &c. Rld. 98 N. Y. 274; Robel v. Chicago, &c. Ry. 35 Minn. 84; Jones v. Louisville, &c. Rld. 82 Ky. 610; Dunmead v. American Min. &c. Co. 4 McCrary, 244; Cooper v. Butler, 7 Out. Pa. 412; Augusta, &c. Rld. v. Dorsey, 68 Ga. 228; Schroeder v. Michigan Car Co. 56 Mich. 132; Clark v. St. Paul, &c. Rld. 28 Minn. 128; The State v. Malster, 57 Md. 287; McGrath v. New York, &c. Rld. 14 R. I. 357; Clark v. Richmond, &c. Rld. 78 Va. 709; Miller v. Union Pac. Ry. 2 McCrary, 87; Owen v. New York Cent. Rld. 1 Lans. 108; Baker v. Hughes, 2 Colo. 79;

Pennsylvania Rld. v. Wachter, 60 Md. 395; Craig v. Manhattan Ry. 13 Daly, 214; Wells v. Coe, 9 Colo. 159; Woodward Iron Co. v. Jones, 80 Ala. 123; Sheeler v. Chesapeake, &c. Rld. 81 Va. 188; White v. Nonantum Worsted Co. 144 Mass. 276; Lehigh Valley Rld. v. Greiner, 3 Am. Pa. 600; Downey v. Chesapeake, &c. Ry. 28 W. Va. 732; St. Louis Bolt, &c. Co. v. Brennan, 20 Bradw. 555; Chicago, &c. Rld. v. Dignan, 56 Ill. 487; Central Trust Co. v. Wabash, &c. Ry. 26 Fed. Rep. 897; Henry v. Sioux City, &c. Ry. 66 Iowa, 52; Brown v. Byroads, 47 Ind. 435; Muldowney v. Illinois Cent. Rld. 39 Iowa, 615; Sprong v. Boston, &c. Rld. 58 N. Y. 56; Illinois Cent. Rld. v. Patterson, 69 Ill. 650; Cunningham v. Chicago, &c. Ry. 17 Fed. Rep. 882; Farmer v. Central Iowa Ry. 67 Iowa, 136; Gibbons v. Chicago, &c. Ry. 66 Iowa, 231; Bucklew v. Central Iowa Ry. 64 Iowa, 603; Hooper v. Columbia, &c. Rld. 21 S. C. 541; Murphy v. New York Cent. &c. Rld. 11 Daly, 122; Ferguson v. Central Iowa Ry. 58 Iowa, 293; Martensen v. Chicago, &c. Ry. 60 Iowa, 705; Farley v. Chicago, &c. Ry. 56 Iowa, 337; Chambers v. Western

§ 681. **The Previous Expositions**, — in the chapter just referred to, having made plain the nature of the doctrine, its reasons, and the methods of its application, and multitudes of cases having just been cited to aid the practitioner under the present head, it would not be within the scope of this volume to enter here upon a minuter statement of the special facts, and the decisions upon them, in the several litigated cases.

VII. *The Liabilities of the Master.*

§ 682. **Already**, — in the preceding sub-titles, we have pretty well exhausted the subject of this. Yet a few more explanations are desirable.

§ 683. **Defined**. — The doctrine is, that the master is not the insurer of his servants against accidents in his service,¹ yet that he owes to them carefulness, to a degree reasonable in the particular instance, in providing for them and keeping in repair safe appliances and a safe place to work, in selecting suitable fellow servants, and in giving the needed instruction to those who are new to the business or of immature capacity;² and, for an injury which, through negligence in this duty, comes to a servant who is not himself contributorily negligent, he is responsible, but not for injuries from defects in the

N. C. Rld. 91 N. C. 471 ; St. Louis, 307 ; Thorpe v. Missouri Pac. Ry. 89 &c. Rld. v. Marker, 41 Ark. 542 ; Mo. 650 ; Stroble v. Chicago, &c. Ry. 70 Iowa, 555 ; Chicago, &c. Ry. v. Pfeiffer v. Ringler, 12 Daly, 437 ; Savannah, &c. Ry. v. Barber, 71 Ga. 644 ; Snyder, 117 Ill. 376 ; Bauer v. St. Riley v. Connecticut River Rld. 135 Louis, &c. Ry. 46 Ark. 388 ; Hughes Mass. 292 ; Blanchette v. Border City v. Winona, &c. Rld. 27 Minn. 137 ; Manuf. Co. 143 Mass. 21 ; Kresanowski Walsh v. St. Paul, &c. Rld. 27 Minn. v. Northern Pac. Rld. 5 McCrary, 528, 367 ; Chicago, &c. Ry. v. Donahue, 75 18 Fed. Rep. 229 ; McKune v. California Southern Rld. 66 Cal. 302 ; Ca- Ill. 106 ; Sherman v. Chicago, &c. Ry. 34 Minn. 259.
hill v. Hilton, 106 N. Y. 512 ; Reading
Iron Works v. Devine, 13 Out. Pa. 246 ;
East Tennessee, &c. Rld. v. Rush, 15
Lea, 145 ; Bunt v. Sierra Buttes Gold
Min. Co. 24 Fed. Rep. 847 ; Kroy v.
Chicago, &c. Rld. 32 Iowa, 357 ; Gard-
ner v. Michigan Cent. Rld. 58 Mich.
584 ; Memphis, &c. Rld. v. Thomas, 51
Missis. 637 ; Kelly v. Abbot, 63 Wis.

¹ Ante, § 657 ; Muster v. Chicago, &c. Ry. 61 Wis. 325 ; Whitelaw v. Memphis, &c. Rld. 16 Lea, 391 ; Viets v. Toledo, &c. Ry. 55 Mich. 120 ; Dallas v. Gulf, &c. Ry. 61 Texas, 196 ; Richardson v. Pacific Mail Steams. Co. 5 Saw. 252.

² Ante, § 651, 652 ; Williams v. Churchill, 137 Mass. 243.

appliances or place not discoverable on due examination, or for the negligence of carefully selected fellow servants, or for injuries from situations and appliances the risks whereof the servant has assumed.¹

§ 684. **Master's Negligence Contributing.** — Within a doctrine explained in a preceding chapter,² a master whose negligence contributed to the injury of a servant is, if the servant's negligence did not contribute also, liable for the entire injury, though some other force for which the former is not responsible — for example, the negligence of a fellow servant — likewise contributed.³

§ 685. **Sunday Accidents.** — The running of trains on Sunday by railroads is not in all circumstances a violation of the statutes; or, if it were, this circumstance would not by the better doctrine⁴ protect the road from liabilities to servants for injuries received in such service;⁵ or, on the other hand, create a responsibility where there would be none ordinarily.⁶

§ 686. **Servant or not.** — A servant's wife is not a servant;

¹ Ante, § 637, 639, 643, 647, 658, 665, 671, 675, 677, 680; *Kuhns v. Wisconsin*, &c. Ry. 70 Iowa, 561; *Henry v. Brady*, 9 Daly, 142; *Ross v. Chicago*, &c. Ry. 2 McCrary, 235; *Hofnagle v. New York Cent. &c. Rld.* 55 N. Y. 608; *Toledo, &c. Ry. v. Ingraham*, 77 Ill. 309; *Pool v. Chicago, &c. Ry.* 56 Wis. 227; *O'Donnell v. Allegheny Valley Rld.* 9 Smith, Pa. 239; *Ransier v. Minneapolis, &c. Ry.* 32 Minn. 331; *Chicago, &c. Rld. v. Rung*, 104 Ill. 641; *McDermott v. New York Cent. &c. Rld.* 28 Hun, 325; *Kelley v. Chicago, &c. Ry.* 53 Wis. 74; *Chicago, &c. Rld. v. Bingenheimer*, 116 Ill. 226; *Lockwood v. Chicago, &c. Ry.* 55 Wis. 50; *International, &c. Ry. v. McCarthy*, 64 Texas, 632; *Harold v. New York Cent. &c. Rld.* 13 Daly, 89; *Young v. New York Cent. &c. Rld.* 13 Daly, 294; *Gulf, &c. Ry. v. Redeker*, 67 Texas, 181; *Atlanta, &c. Ry. v. Woodruff*, 66 Ga. 707; *Ryan v. Miller*, 12 Daly, 77; *Chicago, &c. Rld. v. Loneragan*, 118 Ill. 41; *Nichols v. Chicago,*

&c. Ry. 69 Iowa, 154; *Central Rld. v. DeBray*, 71 Ga. 406; *O'Neill v. Keokuk, &c. Ry.* 45 Iowa, 546; *Flynn v. Kansas City, &c. Rld.* 78 Mo. 195; *Greenwald v. Marquette, &c. Rld.* 49 Mich. 197; *East Tennessee, &c. Rld. v. Gurley*, 12 Lea, 46; *Pennsylvania Co. v. Roney*, 89 Ind. 453; *Beems v. Chicago, &c. Rld.* 58 Iowa, 150; *Lee v. Woolsey*, 13 Out. Pa. 124; *Schall v. Cole*, 11 Out. Pa. 1; *Gumz v. Chicago, &c. Ry.* 52 Wis. 672; *Jeffrey v. Keokuk, &c. Ry.* 56 Iowa, 546; *Somerset, &c. Rld. v. Galbraith*, 13 Out. Pa. 32.

² Ante, § 518.

³ *Crutchfield v. Richmond, &c. Rld.* 76 N. C. 320; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Paulmier v. Erie Rld.* 5 Vroom, 151; *Stringham v. Stewart*, 100 N. Y. 516; *Baltimore, &c. Rld. v. McKenzie*, 81 Va. 71.

⁴ Ante, § 62-64.

⁵ *Johnson v. Missouri Pac. Ry.* 18 Neb. 690.

⁶ *Houston, &c. Ry. v. Rider*, 62 Texas, 267.

so that, for example, if she is a passenger on a railroad whereon he is employed, and she receives an injury through the negligence of a fellow servant, he may have his damages of the road.¹ But one who assists a servant, though voluntarily and temporarily, is a servant within the doctrines of this chapter,²—a proposition subject to qualifications under special circumstances.³ There are other similar questions, arising under varying facts, but their solution will ordinarily be obvious.⁴

VIII. *The Liabilities of the Servants to One Another.*

§ 687. **General.**—A servant sued by a fellow servant whom his negligence has injured, cannot avail himself of the master's non-liability. But, within the doctrine that one is answerable personally for his torts committed in a service, explained in the last chapter,⁵ the liability of fellow servants to one another is the same as between any other persons.⁶

IX. *Statutory Modifications of the Doctrines.*

§ 688. **General.**—In most of our States, the doctrines of the common law, as explained in the foregoing sub-titles, remain undisturbed by statutory innovations. In a few of them, there are statutes more or less changing the common-law rules. If they were more numerous, it would still not be within the plan of this volume to enter much into their consideration. The forms of legislation differ; thus,—

¹ *Gannon v. Housatonic Rld.* 112 Mass. 234.

² *Degg v. Midland Ry.* 1 H. & N. 773, 3 Jur. N. S. 395; *Potter v. Faulkner*, 1 Best & S. 800; *Mayton v. Texas, &c. Ry.* 63 Texas, 77; *Barstow v. Old Colony Rld.* 143 Mass. 535; *Bradley v. Nashville, &c. Ry.* 14 Lea, 374.

³ *Pennsylvania Co. v. Gallagher*, 40 Ohio State, 637; *Eason v. Sabine, &c. Ry.* 65 Texas, 577; *Abraham v. Reynolds*, 5 H. & N. 143, 6 Jur. N. S. 53.

⁴ *O'Brien v. Boston, &c. Rld.* 138 Mass. 387; *Connolly v. Davidson*, 15 Minn. 519; *Philadelphia, &c. Rld. v. The State*, 58 Md. 372; *Curley v. Harris*, 11 Allen, 112; *McCaffrey v. Georgia Southern Rld.* 69 Ga. 622; *Phillips v. Chicago, &c. Ry.* 64 Wis. 475; *The State v. Western Md. Rld.* 63 Md. 433.

⁵ Ante, § 622-630.

⁶ *Osborne v. Morgan*, 130 Mass. 102; *Osborne v. Morgan*, 137 Mass. 1; *Rogers v. Overton*, 87 Ind. 410; *Griffiths*

§ 689. **In England**, — where the longing to be rid of the admirable reasoning of the common law, which has made the administration of justice both an ornament and a blessing, and imparted wisdom and stability to the government itself, has in recent years led to extensive transmutations of common-law doctrines into statutory ones, those within our present elucidations have received the blight of the parliamentary touch. The statute prevailing at the time of the present writing “may be cited as the Employers’ Liability Act, 1880,” and as such it is commonly known.¹ In some degree, yet not greatly, it changes the common law; of which, in its leading feature, it is a codification. In its workings, it follows the ordinary rule in such cases; namely, it increases the uncertainties of the law, multiplies litigation, and makes the courts busy in wrangles over the interpretation, instead of improving the minds of the judges and augmenting their capacity for usefulness by exercises in the profounder reasonings of the law.²

§ 690. **With us**, — while there seems to have been some legislation of the codification sort, most of the little we have, has been in the legitimate changing of common-law rules by statutes.³ The most important change, found in only a few

v. Wolfram, 22 Minn. 185; *Cray v. Philadelphia, &c. Rld.* 23 Blatch. 263, 267, 268.

¹ 43 & 44 Vict. c. 42.

² Thus, looking for late English cases, the first one to which by chance I open is *Yarmouth v. France*, 19 Q. B. D. 647. The common law governing the question was plain, but the judges differed as to whether it was within the common law or the statute. The majority deemed it statutory; and then followed the profound inquiry, which the statute rendered imperative, whether or not a wharfinger’s driver is a “workman,” a horse is a “plant,” and an inveterate disposition to kick is a “defect in the condition” of the plant. One judge dodged this question, and the rest argued it out in the affirmative. The case principally commented

on in this one is *Thomas v. Quartermaine*, 18 Q. B. D. 685. There also the judges were divided on a question plain at the common law, but this time it was the minority that deemed it to be within the statute. Here, at the outset of our looking, the first two cases have set the judges by the ears, while neither would have been carried into court but for the codification. Instead of travelling through the rest of the cases, a part of which would be found to be like these and a part not, let us pause and reflect.

³ I do not propose to refer to the statutes, that being a work which each practitioner can best do for himself, for his own State. Some of the cases which happen to be before me are —

California. — *Beeson v. Green Mountain Gold Min. Co.* 57 Cal. 20.

Dakota. — *Herbert v. Northern Pac.*

States, consists of taking from the master his common-law protection from liability for a fellow servant's negligence. While the English legislation is an abortive attempt to lighten the labor of lawyers and judges by a pretended simplification of the law, resulting in new uncertainties, an increase of litigation, and a transmuting of the reasonings of the common law into quiddlings over words and phrases, the American is in the interest of shifting the responsibilities of labor upon capital, and so forcing indirectly something out of capital for the benefit of labor. Combinations to compel employers to pay the same wages to poor workmen as to good ones, strikes to keep up or raise wages, and various other like things have the same beneficent end in view; but the end to which they all are really travelling is the driving of capital into investments in which it will not employ labor, thus reducing the wages of some and leaving others with nothing to do, increasing the profits of the employers by augmenting the prices of necessities for the poor, and making the rich of the country richer and the poor poorer.

§ 691. *The Doctrine of this Chapter restated.*

From the nature of the present subject, and of the divisions of it required to render the elucidations clear, more than the average repetitions have in its treatment become necessary. Therefore a restatement of the doctrines here would seem to be superfluous. The leading principle, around which the others cluster, is, that the master should exercise, in the carry-

Rld. 3 Dak. 38; Northern Pac. Rld. v. Herbert, 116 U. S. 642.

Georgia. — Georgia Rld. & Co. v. Goldwire, 56 Ga. 196; Georgia Rld. v. Ivey, 73 Ga. 499.

Iowa. — Philo v. Illinois Cent. Rld. 33 Iowa, 47; McKnight v. Iowa, & Co. Rld. Const. Co. 43 Iowa, 406; First Nat. Bank v. Davies, 43 Iowa, 424; Smith v. Burlington, & Co. Ry. 59 Iowa, 73; Houser v. Chicago, & Co. Ry. 60 Iowa, 230; Foley v. Chicago, & Co. Ry. 64 Iowa,

644; Malone v. Burlington, & Co. Ry. 65 Iowa, 417; Luce v. Chicago, & Co. Ry. 67 Iowa, 75; Matson v. Chicago, & Co. Ry. 68 Iowa, 22; Stroble v. Chicago, & Co. Ry. 70 Iowa, 555; Chicago, & Co. Ry. v. McLaughlin, 119 U. S. 566.

Kansas. — Kansas Pac. Ry. v. Peavey, 29 Kan. 169; Union Pac. Ry. v. Harris, 33 Kan. 416; Kansas Pac. Ry. v. Peavey, 34 Kan. 472.

Maryland. — The Highland Light, Chase Dec. 150.

ing on of his business, all the watchfulness over his servants and employ all the safeguards which a reasonable and considerate prudence may dictate. For any violation of this duty, resulting in an injury to a servant, he is answerable to him. But for casualties not traceable to any neglect or to any other wrong in the master, he is not responsible. This also is the leading principle governing the liabilities of men to one another in the other relations of life. From this principle proceeds the common-law doctrine, more objected to than all the others within this title, that the master who carefully chooses his servants is not answerable to one of them for injuries resulting from the negligence of another,—a doctrine in a few of the States obliterated by statutes.

CHAPTER XXXIII.

PRINCIPAL AND AGENT.

§ 692. **Compared with Master and Servant.** — An agent is one who acts either generally or in a particular thing in the behalf or instead of another, called the principal. So that, as there cannot be a master without a servant or a servant without a master,¹ there cannot be a principal without an agent or an agent without a principal. Moreover, a servant is commonly an agent, and ordinarily an agent is a servant. In the law of contracts, the related parties are usually termed principal and agent; in the non-contract law, master and servant. In both, there may be an agent or servant by estoppel² as well as by direct appointment. Hence, —

§ 693. **Already.** — The elucidations of the last two chapters cover also the subject of this. A few deductions from the larger doctrines may be serviceable here; thus, —

§ 694. **Agency not disclosed.** — An agent who contracts for the principal without disclosing his agency is personally bound.³ Therefore, if such contracting consists of hiring a workman, the agent is answerable to the workman for injuries suffered from the agent's negligence.⁴ On the other hand, a principal not disclosed by his contracting agent may enforce the contract in his own name,⁵ or the person bargaining with such agent may on ascertaining the facts sue the principal.⁶ Then, should such an agent, really in his master's service but apparently acting for himself, injure another by a

¹ Ante, § 599.

² Ante, § 600; Bishop Con. § 288, 1091; Toledo, &c. Ry. v. Elliott, 76 Ill. 67; Earle v. Wallingford, 44 Vt. 367.

³ Bishop Con. § 1076.

⁴ Maloq v. Morton, 84 Mo. 436.

⁵ Bishop Con. § 1080.

⁶ Ib. § 1079.

tort, the latter may if he elects recover his damages of the master.¹

§ 695. **Agent's Wrong.** — As a servant is liable for his own torts,² so also is one who is termed agent. Thus, if he assists the principal in a breach of trust, he is personally responsible.³ But if there is a duty resting on the principal and not on the agent, its non-performance by the latter creates no liability in him.⁴ For example, an agent having the care of real estate is not answerable to a third person for injuries through his neglect to keep it in safe repair.⁵

§ 696. *The Doctrine of this Chapter restated.*

The relation of principal and agent is nearly yet not absolutely identical with that of master and servant. The former correlate term is commonly employed in the law of contracts; the latter, in the non-contract law. This is the chief explanation required under the present head. A vice-principal, spoken of in the last chapter, is with greater accuracy of language termed an agent than a servant. But the words employed to describe a thing in the law are quite distinct from the law itself.

¹ *Pickens v. Diecker*, 21 Ohio State, 212.

⁴ Ante, § 446, 628.

² Ante, § 622-630.

⁵ *Delaney v. Rochereau*, 34 La. An. 1123. And see *Crandall v. Loomis*, 56

³ *Attorney-General v. Leicester*, 7 Vt. 664. Beav. 176.

CHAPTER XXXIV.

PERSONS ASSUMING SPECIAL SKILL.

§ 697. Introduction.

698-703. In General.

704-707. Lawyers.

708-715. Physicians and Surgeons.

716. Apothecaries.

717. Doctrine of Chapter restated.

§ 697. **How Chapter divided.** — We shall consider, I. The Doctrine in General; II. Lawyers; III. Physicians and Surgeons; IV. Apothecaries.

I. *The Doctrine in General.*

§ 698. **Defined.** — It is a species of deceit,¹ therefore actionable, for one to assume skill or learning which he does not possess, and thereby procure another, whether through a contracting² or not, to employ him about some matter, then do it unskilfully or ignorantly, — or, having the skill and knowledge, do a thing about which he is employed negligently, — in either case, to the other's injury.³ And it is a similar wrong, the limits of which are not so easily defined, for one in a position acquired through possessing some special skill or knowledge, to injure a third person by a malfeasance of his duties. Thus, —

§ 699. **Caterer.** — A caterer, by virtue of his profession, holds himself out as competent and trustworthy to provide

¹ Ante, § 315.² Bishop Con. § 246, 1416.³ The New World v. King, 16 How. U. S. 469; Seare v. Prentice, 8 East,

348, 352; Slater v. Baker, 2 Wils. 359; George v. Skivington, Law Rep. 5 Ex.

1; Lee v. Walker, Law Rep. 7 C. P. 121.

proper and wholesome food. Thereupon, if he prepares a supper for a ball, one who partakes of it and is injured by its unwholesomeness may have of him the damages.¹

§ 700. **An Examiner of Titles** — is answerable for an injury resulting from a lack of the ability or carefulness which his holding out, or his assumption of the duty, implies.²

§ 701. **Answerable for what** — (**Engineer**). — An engineer or surveyor is liable for injuries from his want of reasonable and ordinary skill, from his negligence, and from his frauds, but he is not an insurer of the correctness of his work.³ And the like principle applies to other analogous cases; one taking upon himself to do a thing within his profession does not guarantee success.⁴

§ 702. **Answerable to whom** — **Contract or not**. — The liability will be only to some person legally injured.⁵ And there are circumstances in which, if there is no contract between the one complaining and the other, there is no legal injury.⁶ But commonly the harm is the same whether there is a contract or not, or if there is a contract, whether the complaining party is privy to it or not; simply the one who has suffered from the wrong brings his action against the wrong-doer.⁷

§ 703. **Universality of Doctrine**. — The principles thus stated are from their nature universal, extending through all the activities of life. The particular applications of them to be stated in the remaining sub-titles are mere added illustrations of the foregoing doctrine; they are not presented as exhaustive of the subject.

¹ Bishop v. Weber, 139 Mass. 411.

² Roberts v. Leon Loan, &c. Co. 63 Iowa, 76; Rankin v. Schaeffer, 4 Mo. Ap. 108; Roberts v. Sterling, 4 Mo. Ap. 593; Chase v. Heaney, 70 Ill. 268; Knights v. Quarles, 4 Moore, 532.

³ McCarty v. Bauer, 3 Kan. 237.

⁴ Bishop Con. § 1416; Lanphier v. Phipos, 8 Car. & P. 475, 479; Hancke v. Hooper, 7 Car. & P. 81.

⁵ Ante, § 22-34, 143, 254, 315.

⁶ Ante, § 73, 76; Longmeid v. Holliday, 6 Exch. 761; Savings Bank v. Ward, 100 U. S. 195.

⁷ Pippin v. Sheppard, 11 Price, 400; Thomas v. Winchester, 2 Selden, 397; Norton v. Sewall, 106 Mass. 143; Parke, B. in Longmeid v. Holliday, supra, at p. 767; Bishop v. Weber, 139 Mass. 411.

II. *Lawyers.*

§ 704. **General.** — One who holds himself out as a legal practitioner assumes thereby the professional learning and skill which are common to lawyers.¹ And a client injured from a lack of such learning and skill, or from the negligent discharge of a duty whether by one competent or not, may have his action in tort for the damages, yet not for the consequences of those mistakes and miscalculations which are inevitable in professional practice.² This liability is deemed in England to attach only to attorneys, who are entitled to enforce compensation for their services, not to counsel who cannot recover fees because their employment is in legal contemplation honorary.³ In an English book⁴ it is stated that there is no instance of a successful action for a barrister's neglect; but, if he "intentionally does a wrong, and acts with malice, fraud, or treachery in the discharge of his professional duties, he will be responsible like every other wrong-doer for the mischief thereby occasioned."⁵ With us, all lawyers stand as to their fees in the position of the English attorneys, and it is immaterial what may be the rights and liabilities of barristers.

§ 705. **Degree of Negligence.** — By some opinions, the negligence or ignorance which will charge a lawyer must be gross.⁶ Yet it would be difficult to assign any just reason for exempting him from ordinary professional learning and care; so that we may deem the better rule to be, what is by others laid down, that he is responsible for injuries to his clients from a

¹ *Caverly v. McOwen*, 123 Mass. 574; *Yalden*, supra, at p. 2061, and of *Holt* in *Adams v. Savage*, *Holt*, 179.

² *Pitt v. Yalden*, 4 Bur. 2060; *Russell v. Palmer*, 2 Wils. 325, explained 4 Bur. 2063; *Green v. Rennett*, 1 T. R. 656; *Reece v. Righy*, 4 B. & Ald. 202; *Hart v. Frame*, 6 Cl. & F. 193, 3 Jur. 547.

³ *Fell v. Brown*, Peake, 96. Consult *dicta* of Lord Mansfield in *Pitt v.*

⁴ *Addison Torts*, p. 500, of Am. ed. of 1876.

⁵ Referring to *Swinfen v. Chelmsford*, 5 H. & N. 890, 919.

⁶ Lord Ellenborough in *Baikie v. Chandless*, 3 Camp. 17, 20; *Evans v. Watrous*, 2 Port. 205; *Pennington v. Yell*, 6 Eng. 212.

lack of reasonable carefulness and skill, proportioned to the character of the business which he undertakes.¹

§ 706. **Fidelity** — is a duty due from every employee to his employer.² And the confidential relationship of the practising lawyer to his client adds emphasis to the rule as between him and the client.³ He must not disclose a secret of his client,⁴ or without consent make known or avail himself of any fact or information coming to him through the relationship.⁵ He must acquire no gain to himself at the client's expense.⁶ He must not accept retainers on both sides of a controversy.⁷ If he becomes herein a wrong-doer, he like others will be liable to a civil suit only when a legal injury has resulted from his unlawful act;⁸ but, when it has, his client may recover of him the damages, or have such other redress as the circumstances of the case indicate.

§ 707. **Injuring Third Persons.** — As the lawyer is not protected in committing a crime even in the service of his client,⁹ so he is not in inflicting a civil wrong on an individual.¹⁰ Thus, while he may not be answerable for simply putting into an officer's hands a void warrant of arrest, if he goes further and distinctly directs its execution, he must respond to the arrested person in damages.¹¹ Or if, with the required knowledge and malice, he is a party with his client in a malicious

¹ *Hart v. Frame*, 6 Cl. & F. 193, 3 Jur. 547, 550; *Cox v. Sullivan*, 7 Ga. 144; *O'Barr v. Alexander*, 37 Ga. 195; *Holmes v. Peck*, 1 R. I. 242; *Wilson v. Russ*, 20 Maine, 421; *Riddle v. Poorman*, 3 Pa. 224; *Watson v. Muirhead*, 7 Smith, Pa. 161; *Godefroy v. Dalton*, 6 Bing. 460, 468; *Kemp v. Burt*, 4 B. & Ad. 424; *Lanphier v. Phipos*, 8 Car. & P. 475; *Shilcock v. Passman*, 7 Car. & P. 289.

² *Bishop Con.* § 1416.

³ *Luddy v. Peard*, 33 Ch. D. 500; *Baylis v. Watkins*, 2 DeG. J. & S. 91, 10 Jur. N. S. 114; *Foy v. Cooper*, 2 Q. B. 937, 939.

⁴ *Com. Dig.* Action upon the Case for a Deceit, A, 5.

⁵ *Johnson v. Marriott*, 2 Crompt. & M. 183; *Grissell v. Peto*, 2 Moore &

S. 2, 9 Bing. 1; *Sleeper v. Abbott*, 60 N. H. 162; *Vogel v. Gruaz*, 110 U. S. 311; *In re Hahn*, 11 Abb. N. C. 423.

⁶ *Tyrrell v. Bank of London*, 10 H. L. Cas. 26, 8 Jur. N. S. 849; *Simpson v. Lamb*, 7 Ellis & B. 84; *Lewis v. Hillman*, 3 H. L. Cas. 607; *Gibbons v. Hoag*, 95 Ill. 45; *People v. Murphy*, 119 Ill. 159; *Luddy v. Peard*, *supra*.

⁷ *Mason's Case*, *Freeman*, 74.

⁸ *Ante*, § 22-34, 702; *Harter v. Morris*, 18 Ohio State, 492; *Joy v. Morgan*, 35 Minn. 184; *Read v. Paterson*, 11 Lea, 430.

⁹ 1 *Bishop Crim. Law*, § 895.

¹⁰ *Naltner v. Dolan*, 108 Ind. 500.

¹¹ *Green v. Elgie*, 5 Q. B. 99, 114; *Fischer v. Langbein*, 103 N. Y. 84, 89.

prosecution, or if with full knowledge he submits in such a case to carry out his client's malice,¹ he is responsible to the person prosecuted.² A simple transmitting of a client's directions to an officer, as to what property to take on a writ, will not render the attorney liable to a person not the defendant, claiming it;³ but, where the facts are fully known to the attorney, and he deliberately directs the taking of such property and refuses to relinquish it, he is personally responsible with the client.⁴ Neither he nor the client can be required to pay damages for what an officer does unmoved, not within the command of the precept.⁵ Nor yet is he liable if, after innocently and without malice prosecuting an action against a person of a particular name, and taking out execution on the judgment, it appears that another person of the same name had been levied upon, on the assumption of his being the defendant.⁶

III. *Physicians and Surgeons.*

§ 708. In England,—the professions of medicine and surgery were formerly quite distinct. Both have been from early times and still are much regulated by statutes. They are now more nearly or substantially one. Until 1858, when the "Medical Act" of 21 & 22 Vict. c. 90 was passed, the practitioner of medicine, like the barrister,⁷ was not entitled to recover his fees by suit, his calling being deemed honorary.⁸ But that statute changed the law, and he can now compel payment for services, as in the United States.⁹ A surgeon not disqualified by want of license was always in England, as with us, entitled like any other employee to demand compensation for his work.¹⁰ A physician, criminally guilty of

¹ Peck v. Chouteau, 91 Mo. 138.

² Staley v. Turner, 21 Mo. Ap. 244; Burnap v. Marsh, 13 Ill. 535.

³ Dawson v. Buford, 70 Iowa, 127.

⁴ Cook v. Hopper, 23 Mich. 511.

⁵ Adams v. Freeman, 9 Johns. 117; Averill v. Williams, 1 Denio, 501.

⁶ Davies v. Jenkins, 11 M. & W. 745.

⁷ Ante, § 704.

⁸ Chorley v. Bolcot, 4 T. R. 317.

But in 1842, the Court of Queen's Bench decided that he might recover for services rendered, by proving an actual, express promise to pay for them. Veitch v. Russell, 3 Q. B. 928.

⁹ Gibbon v. Budd, 2 H. & C. 92, 9 Jur. N. S. 525.

¹⁰ Elliot v. Clayton, 16 Q. B. 581; Gremaire v. Le Clerc Bois Valon, 2

malpractice, was under the old law indictable.¹ Probably, within the rule applicable to barristers,² he was not liable civilly for the consequences of simple negligence or want of skill; hence the English reports furnish us no precedents on our present subject, as to licensed physicians. To proceed now with the law as in later years understood equally in England and the United States, —

§ 709. **Diploma or not — Holding out.** — A practitioner of medicine or surgery assumes the learning and skill which he holds himself out as possessing; and, in an action for malpractice, it is neither, on the one hand, a defence for him that he has taken up the practice without a diploma;³ nor, on the other hand, is a diploma a protection against inquiry as to his qualifications in the particular instance.⁴ And —

§ 710. **Assuming what Skill — Care.** — One who, in general terms, holds himself out as a physician or surgeon, assumes, and is liable for the non-exercise of, the learning and skill common to practitioners of his class or school (not attainments or ability of the highest order); so that, for an injury to a patient through a default herein, or through a want of ordinary care and attention, an action will lie against him.⁵ If, instead of professing the practice of medicine according to its more common forms, he is a botanic physician, he is required still to exercise the ordinary care,⁶ yet the skill and

Camp. 144, as to which see 2 M. & W. 159; *Little v. Oldaker*, Car. & M. 370; *D'Allex v. Jones*, 2 Jur. N. s. 979; *Cooper v. Phillips*, 4 Car. & P. 581.

¹ *Greonvelt's Case*, 1 Ld. Raym. 213; *Rex v. Long*, 4 Car. & P. 423.

² Ante, § 704.

³ *Ruddock v. Lowe*, 4 Fost. & F. 519; *Jones v. Fay*, 4 Fost. & F. 525; *Wood v. Clapp*, 4 Sneed, 65; *Long v. Morrison*, 14 Ind. 595; *Musser v. Chase*, 29 Ohio State, 577.

⁴ It is the constant practice, in every case, to look beyond the diploma into the qualifications; and no particular instance need be cited.

⁵ *Hallam v. Means*, 82 Ill. 379; *Gramm v. Boener*, 56 Ind. 497; *Rich*

v. Pierpont, 3 Fost. & F. 35; *Ritchey v. West*, 23 Ill. 385; *Quinn v. Higgins*, 63 Wis. 664; *Goodwin v. Hersom*, 65 Maine, 223; *Lanphier v. Phipos*, 8 Car. & P. 475; *Landon v. Humphrey*, 9 Conn. 209; *McNevens v. Lowe*, 40 Ill. 209; *Howard v. Grover*, 28 Maine, 97; *Patton v. Wiggin*, 51 Maine, 594; *Leighton v. Sargent*, 7 Fost. N. H. 460; *Craig v. Chambers*, 17 Ohio State, 253; *McCandless v. McWha*, 10 Harris, Pa. 261; *Graham v. Gautier*, 21 Texas, 111; *Simonds v. Henry*, 39 Maine, 155; *West v. Martin*, 31 Mo. 375; *Slater v. Baker*, 2 Wils. 359; *Seare v. Prentice*, 8 East, 348.

⁶ *Bishop Con.* § 1416.

methods need conform only to the botanic system.¹ Or, if one goes to an apothecary, not professing medical knowledge, and receives an honest prescription, he cannot complain though it should not accord with medical science.²

§ 711. **Conflicting Medical Opinions.** — While surgery has become a science, medicine has scarcely attained the dignity of an art. Not only have we differing schools of medicine, the methods of each of which are to the others quackery, but in the standard schools, to quote the words of a learned judge, “medical science has not yet arrived at that degree of perfection which will enable its practitioners to agree. There is scarcely a case tried where medical testimony is used, in which the doctors do not disagree. The swearing is sometimes so bitterly antagonistic as to make it painful to listen to.”³ The excuse for which is, that, since the make-up and workings of the physical systems of men differ, and diseases vary therewith, and since no one can view with his eyes the internal structure of another or truly discern the effect of a medicine on it or on a disease, — since, therefore, a remedy which seems effectual with one person having a disease of a particular name proves ineffectual or injurious with another person to whose disease the same name has been given, — there can be no foundation for an opinion on a medical question. Men will differ as to how far this excuse is valid. But the misfortune, which has attended man in every age, not quite excepting the present, is, that the more baseless an opinion, the more readily and firmly will the mass adopt and cling to it. They will fight for what they cannot know, and make the present life a hell to enforce their speculations over the future. Now, —

§ 712. **Evidence — Caution.** — To establish the contention that a particular treatment proceeded from ignorance or negligence, it is the usage of the courts to receive the expert tes-

¹ *Bowman v. Woods*, 1 Greene, Iowa, 441.

² *Kannen v. McMullen*, Peake, 59, a case from which the proposition of the text results inferentially. Compare

this case with *Lipscombe v. Holmes*, 2 Camp. 441.

³ *Walton, J. in Seavey v. Preble*, 64 Maine, 120, 122.

timony of physicians.¹ Thereupon, if the question is one upon which physicians of ordinary capacity and learning differ, and the defendant treated the case in controversy honestly and carefully, he ought not to be required to pay damages simply because a majority of the witnesses, against the opinion of a minority however small, deem the treatment to have been mistaken. The sick person employed the medical man he chose; so that, in a matter of difference of medical opinion, the case is analogous to his choosing a physician from a school not in the majority.

§ 713. **Physician's Reputation.** — Like a medical degree,² the good reputation of a physician is not a protection against a charge of malpractice.³

§ 714. **Contributory Negligence.** — To the action for the physician's negligence, the patient's contributory negligence⁴ is a bar.⁵ An illustration of which is the refusal to obey instructions.⁶

§ 715. **Contributing Cause.** — Within a principle explained in a preceding chapter,⁷ it is no answer to a suit for malpractice that other causes than the defendant's wrong contributed to the plaintiff's sufferings.⁸

IV. *Apothecaries.*

§ 716. **General.** — One who practises as apothecary or druggist,⁹ whether under a license or not, holds himself out as

¹ *Mertz v. Detweiler*, 8 Watts & S. 376; *Wright v. Hardy*, 22 Wis. 348; *Twombly v. Leach*, 11 Cush. 397; *Mosely v. Wilkinson*, 14 Ala. 812.

² *Ante*, § 709.

³ *Holtzman v. Hoy*, 118 Ill. 534, 19 Bradw. 459. And see *Vanhooser v. Berghoff*, 90 Mo. 487; *Leighton v. Sargent*, 7 Fost. N. H. 460, 11 Fost. N. H. 119; *Holmes v. Halde*, 74 Maine, 28.

⁴ *Ante*, § 458-476.

⁵ *Gramm v. Boener*, 56 Ind. 497; *Hibbard v. Thompson*, 109 Mass. 236.

⁶ *Geiselman v. Scott*, 25 Ohio State, 86; *Jones v. Angell*, 95 Ind. 376.

⁷ *Beginning ante*, § 517.

⁸ *Gates v. Fleischer*, 67 Wis. 504, cited *ante*, § 518.

⁹ "The practising as an apothecary is the mixing up and preparing of medicines prescribed by a physician or other medical practitioner, who prescribes; or, the mixing up and preparing of medicines prescribed by the party himself." *Williams, J. in Woodward v. Ball*, 6 Car. & P. 577. The selling of medicines, without a formal prescription, is a common duty of apothecaries with us.

competent to do this, yet not to prescribe as a physician; and, for any lack of capacity, or for negligence, he is answerable in damages to the person injured, the same principles of law applying to him as to a medical practitioner. The doctrine being thus plain, it is unnecessary to particularize further.¹

§ 717. *The Doctrine of this Chapter restated.*

It is a wrong for one to usurp a calling requiring special qualifications which he does not possess, or in any other way to hold out false pretences to the public. To render this wrong actionable, some person must have suffered an injury therefrom. And he who has suffered such an injury, whether consequent on having contracted with the wrong-doer or not, may recover of him the damages. Moreover, a person thus holding himself out as of some special calling, whether competent therein or not, and conducting it negligently, fraudulently, or otherwise harmfully, must pay the damages to any other person whom he injures. Attorneys-at-law, physicians, and apothecaries furnish the more common illustrations of the principle, but it extends equally to other persons within the same reasons.

¹ *Hansford v. Payne*, 11 Bush, 380; *Ray v. Burbank*, 61 Ga. 505; *McCub-Beckwith v. Oatman*, 43 Hun, 265; *bin v. Hastings*, 27 La. An. 713; *Fleet v. Hollenkemp*, 13 B. Monr. 219; *Gwynn v. Duffield*, 66 Iowa, 708; *Walton v. Winchester*, 2 Selden, 397; *ton v. Booth*, 34 La. An. 913; *Physicians College v. Rose*, 6 Mod. 44.

CHAPTER XXXV.

CORPORATIONS.

§ 718. Introduction.

719-734. General Doctrine.

735-737. Business Corporations.

738-765. Municipal Corporations.

766-768. Other Corporations.

769. Doctrine of Chapter restated.

§ 718. **How Chapter divided.**—We shall consider, I. The General Doctrine; II. Business Corporations; III. Municipal Corporations; IV. Other Corporations.

I. *The General Doctrine.*

§ 719. **Nature of Corporation.**—As man is a creation of nature, so a corporation is a creation of the law; and, in the legal system, the rights, powers, and liabilities of the corporation are, as far as they exist, identical with those of the man. But the sphere of every corporation is limited by the terms and implications of its charter; and, though the spheres differ, each is narrower than man's; so that what the corporation does beyond is *ultra vires*.¹

§ 720. **Manner of its Being.**—In creating a corporation, the law does not vivify particles of dust and mould them into a body for its soul,² as nature does in giving birth and growth

¹ Bishop Con. § 559, 1003, 1005, 1012; 1 Bishop Crim. Law, § 417; *Perrine v. Chesapeake, &c. Canal*, 9 How. U. S. 172; *Dartmouth College v. Woodward*, 4 Wheat. 518, 636.

² I think this expression will be understood, though I do not intend by it

to antagonize the often-quoted sentence from Coke's Reports, affirming that corporations "cannot commit treason, nor be outlawed, nor excommunicate, *for they have no souls*." Case of Sutton's Hospital, 10 Co. 1 a, 32 b.

to a man. But it selects one or more individual men, and supplements their individual capacities and responsibilities with the corporate capacity and responsibility; that is, it makes the body of men the corporate body, and into this corporate body it puts the corporation, which thereupon dwells therein, as an individual man does in his human body.¹ Now, —

§ 721. **Manner of Acting — Motives — Intent.** — From this manner of a corporation's being, the nature and sources of its doings appear. Its purposes, its motives, its acts, are simply, yet fully, the purposes, motives, acts, of the individual corporators and its agents, performing corporate functions within the corporate sphere. If an act, a motive, a purpose, is outside of the sphere of the corporation, or if it is meant to be individual and not corporate, then it is the private act, motive, or purpose of the man or men entertaining or executing it; otherwise, it is the corporation's. There may be, not wholly outside of the corporate sphere, an act of a nature not possible to a corporation. Thus, in the ancient tenure by homage, the tenant in doing this service "shall," says Littleton, "be ungirt, and his head uncovered, and his lord shall sit, and the tenant shall kneel before him on both his knees, and hold his hands jointly together between the

¹ This will appear upon an accurate looking into almost any case wherein the terms of the incorporating act and the steps under it are shown. Thus, in *Frost v. Frostburg Coal Co.* 24 How. U. S. 278, the statute provided that four persons, whose names are given, and such other persons as may be associated with them, "shall be and they are hereby incorporated and made a body politic and corporate, by the name of," &c. This act was held to have cast, by its own immediate force, corporate capacity upon these four men, while, of course, it did not take away their several individual capacities. In the words of Nelson, J. speaking for the whole court, they "were made a corporation by the charter, the persons named

in it constituting the *corporate body*." p. 283. In a previous case, Marshall, C. J. had described a corporation as an "artificial being, invisible, intangible, and existing only in contemplation of law." *Dartmouth College v. Woodward*, 4 Wheat. 518, 636. There is no conflict in these dissimilar forms of expression. The law casts its "invisible, intangible" power upon the collective natural bodies of the particular men, and so constitutes those bodies the corporate body; and their collective minds and souls, with all that pertains to individual man, the corporate mind and soul. So that the corporation, within its sphere, can, not only do human acts, but be impelled thereto by human motives and passions.

hands of his lord, and shall say thus: 'I become your man from this day forward of life and limb, and of earthly worship, and unto you shall be true and faithful, and bear to you faith for the tenements that I claim to hold of you, saving the faith that I owe unto our sovereign lord the king.' And then the lord so sitting shall kiss him."¹ Plainly it is impossible that the lord and a "corporation aggregate of many persons," as Coke expresses it, should execute together these formalities, but the lord and a corporation sole could do it. Therefore it became the law that a corporation aggregate, holding lands in homage, was not required to do homage, but a corporation sole was.² Possibly there may be an intent or a motive not competent for a corporation; but certainly the power of purpose is as great in the corporation as the power of performance. Still, —

§ 722. *Misapprehensions.* — Plain as this matter thus appears, it has not always lain quite so in the professional mind. For example, that standard old book Comyns's Digest, referring to the place in Coke just cited, puts the doctrine thus: "A corporation cannot do a personal act, which requires knowledge; as, homage, or fealty."³ We have just seen that the book to which the author refers for this teaches a very different doctrine. Lord Holt, one of the most able and clear-headed of the early English judges, if correctly reported, said: "A corporation is not indictable, but the particular members of it are."⁴ Yet, though nothing is punishable as crime which does not proceed from an evil mind, the liability of corporations to indictment in proper cases is absolutely settled in

¹ Lit. § 85.

² Co. Lit. 66 b, 67 a.

³ Com. Dig. Franchises, F. 14. In the Case of Sutton's Hospital, 10 Co. 1 a, 32 b, it is said that "a corporation aggregate of many cannot do fealty, for an invisible body can neither be in person nor swear." I should say that the body of a corporation is visible enough, and that it can "be in person;" yet that a corporation aggregate cannot swear, but a corporation sole can.

⁴ Anonymous, 12 Mod. 559. And see *The State v. Great Works Mil. &c. Co.* 20 Maine, 41; *Commonwealth v. Swift Run Gap Turnp.* 2 Va. Cas. 362. Even that consummate master of the common law, Kent, says that a corporation "cannot be considered as a moral agent, and, therefore, it cannot commit a crime, or become the subject of punishment." 2 Kent Com. 279.

law, and in the every-day practice of the courts, both in England and our own country.¹ And still, all along the path of light, in both countries, we meet with protests from the dark. So late as the year 1886, in the English House of Lords, that very eminent and strong judge, Lord Bramwell, in a case which went off without deciding the question, said: "I am of opinion that no action for a malicious prosecution will lie against a corporation. I take this opportunity of saying that as directly and peremptorily as I possibly can; and I think the reasoning is demonstrative. To maintain an action for a malicious prosecution it must be shown that there was an absence of reasonable and probable cause, and that there was malice or some indirect and illegitimate motive in the prosecutor. A corporation is incapable of malice or of motive."² And he proceeded through four pages to "demonstrate" this proposition, upon a basis which he assumed without undertaking to establish it; namely, "because it is impossible that a corporation can have malice or motive," and any acting of its directors from malice or motive would be *ultra vires*. He did not deny the corporate power to do acts, and even to become responsible for evil ones, provided they do not proceed from "malice or motive." The "missing link" in the demonstration was in not even attempting to show how men, who from their mental structure are incapable of performing any act except from some motive, either good or evil, can put forth corporate acts without motive; or how, if they have a motive for a corporate act, it is thereby rendered *ultra vires*. Hence, —

§ 723. **Torts.** — Though the doing of rightful acts is the end for which the law has established corporations, the same as it is the end for which God created man, yet the power to do right carries with it the power to do wrong. Therefore, of necessity, a corporation has, within its circumscribed sphere, the same capacity to purpose and do evil as to intend and do good. So that, by judicial opinions nearly unanimous, the liabilities of corporations for torts are as broad as their several

¹ 1 Bishop Crim. Law, § 417-424.

² *Abrath v. North Eastern Ry.* 11 Ap. Cas. 247, 250, 251.

franchises; namely, each can commit any tort, whether requiring an evil motive or not, which a man, acting within the same limited sphere, could do.¹ Illustrations are —

§ 724. **Negligence.** — It is constant practice to sue and recover damages of corporations for injuries inflicted through negligence in the carrying on of their business. And their liabilities are always — with some exceptions as to municipal corporations, to be considered in a subsequent sub-title — adjudged to be the same as those of individuals in like circumstances.² Even —

§ 725. **Wilful — Trespass — Assault and Battery.** — The wilful injuries of a corporation, such as assault and battery, false imprisonment, and other trespasses to person and property, committed by its servants within its sphere and the line of their duties, will subject it to an action, the same as similar acts would an individual.³ And where an act of this nature would be lawful in an individual, it will be lawful in the corporation.⁴

§ 726. **Forcible Entry.** — The statutes of forcible entry and detainer extend the same to corporations as to individuals, with all their consequences.⁵

§ 727. **Trover** — lies against a corporation.⁶

§ 728. **Libel.** — Corporations have often occasion to make

¹ *Denver, &c. Ry. v. Harris*, 122 U. S. 597, 607, 608; *Goodloe v. Cincinnati*, 4 Ohio, 500, 514; *Alexander v. Relfe*, 74 Mo. 495; *Iron Mountain, &c. Rld. v. Johnson*, 119 U. S. 608; *Detroit Daily Post v. McArthur*, 16 Mich. 447; *Green v. London Gen. Om. Co.* 7 C. B. n. s. 290, 6 Jur. n. s. 228; *Stiles v. Cardiff Steam Nav. Co.* 10 Jur. n. s. 1199; *Indianapolis, &c. Ry. v. Anthony*, 43 Ind. 183.

² *St. Romes v. Levee Steam Cotton Press*, 127 U. S. 614; *Fowle v. Alexandria*, 3 Cranch C. C. 70; *Lacour v. New York*, 3 Duer, 406; *McArthur v. Green Bay, &c. Canal*, 34 Wis. 139; *Wilson v. Wheeling*, 19 W. Va. 323; *Riddle v. Proprietors of Locks*, 7 Mass. 169; *Smith v. Birmingham, &c. Gas-light Co.* 1 A & E. 526; *Scott v.*

Manchester, 1 H. & N. 59, 2 H. & N. 204, 3 Jur. n. s. 590.

³ *Terre Haute, &c. Rld. v. Jackson*, 81 Ind. 19; *Moore v. Fitchburg Rld.* 4 Gray, 465; *Brokaw v. New Jersey Rld. &c. Co.* 3 Vroom, 328; *Jeffersonville Rld. v. Rogers*, 38 Ind. 116; *Maud v. Monmouthshire Canal*, 4 Man. & G. 452, 6 Jur. 932; *Eastern Counties Ry. v. Broom*, 6 Exch. 314; *Goff v. Great Northern Ry.* 3 Ellis & E. 672; *Roe v. Birkenhead, &c. Ry.* 7 Exch. 36.

⁴ *Landrigan v. The State*, 31 Ark. 50; *Hill v. Chicago, &c. Rld.* 38 La. An. 599.

⁵ *Iron Mountain, &c. Rld. v. Johnson*, 119 U. S. 608.

⁶ *Yarborough v. Bank of England*, 16 East, 6; *Giles v. Taff Vale Ry.* 2 Ellis & B. 822; *Beach v. Fulton Bank*, 7 Cow. 485.

statements to the public, and it is uniformly held that they are answerable for any libel therein, and for their libels generally.¹ In like manner, a corporation libelled may have its suit, the same as an individual.²

§ 729. **Nuisance** — is another tort for which corporations may be prosecuted with the same effect as individuals.³

§ 730. **Fraud**. — A corporation, like an individual, may commit a fraud, and it is responsible in the same manner.⁴

§ 731. **Malicious Prosecution**. — Corporations, like individuals, have occasion to bring civil suits, and to set on foot criminal ones. Yet in a few instances it has been held that they can never be made liable for a malicious prosecution; it being assumed that they are incapable of malice, which, however it may exist in their officers and agents, is to them *ultra vires*.⁵ On the other side, the nearly unanimous doctrine is, that the malice of those by whose will and volition a corporation thus acts, is its malice, and it must answer therefor.⁶

¹ Philadelphia, &c. Rld. v. Quigley, 21 How. U. S. 202; Howe Machine Co. v. Souder, 58 Ga. 64; Evening Journal Assoc. v. McDermott, 15 Vroom, 430; Maynard v. Fireman's Fund Ins. Co. 34 Cal. 48; Whitfield v. South Eastern Ry. Ellis, B. & E. 115; Vinas v. Merchants Mut. Ins. Co. 27 La. An. 367; Bacon v. Michigan Cent. Rld. 55 Mich. 224.

² Metropolitan Saloon Om. Co. v. Hawkins, 4 H. & N. 87, 5 Jur. N. s. 226; Buffalo Lubr. Oil Co. v. Standard Oil Co. 42 Hun, 153; Hahnemannian, &c. Ins. Co. v. Beebe, 48 Ill. 87; Knickerbocker Life Ins. Co. v. Ecclesine, 6 Abb. Pr. N. s. 9.

³ Terre Haute Gas Co. v. Teel, 20 Ind. 131; Baltimore, &c. Rld. v. Fifth Bap. Ch. 108 U. S. 317; Miller v. New York, 109 U. S. 385.

⁴ Ranger v. Great Western Ry. 5 H. L. Cas. 72; Lawson v. Bank of London, 18 C. B. 84, 2 Jur. N. s. 716; Atlantic Mut. Fire Ins. Co. v. Goodall, 9 Fost. N. H. 182; Keller v. Equitable Fire Ins. Co. 28 Ind. 170; Barwick v. English Joint Stock Bank, Law Rep. 2

Ex. 259; Lord, J. in Reed v. Home Savings Bank, 130 Mass. 443, 445; Peebles v. Patapsco Guano Co. 77 N. C. 233.

⁵ Ante, § 722; Alderson, B. in Stevens v. Midland Counties Ry. 10 Exch. 352 (not followed in Edwards v. Midland Ry. 6 Q. B. D. 287); Owsley v. Montgomery, &c. Rld. 37 Ala. 560 (overruled in Jordan v. Alabama Great So. Rld. 74 Ala. 85); Childs v. Bank of Missouri, 17 Mo. 213. In the later Missouri case of Gillett v. Missouri Valley Rld. 55 Mo. 315, it was held that a railroad corporation is not answerable for the malicious prosecution of one of its officers for crime, because criminal prosecutions were by the court deemed not to be within its sphere. Evansville, &c. Rld. v. McKee, 99 Ind. 519, is contrary to this. In the still later Missouri case of Boogher v. Life Assoc. of Am. 75 Mo. 319, followed by others, the liability of corporations for malicious prosecution is affirmed.

⁶ Edwards v. Midland Ry. supra; Jordan v. Alabama Great So. Rld. supra; Vance v. Erie Ry. 3 Vroom,

§ 732. *Seduction*. — Plainly not every sort of seduction would be within the sphere of a corporation. But for one that is — as, the hiring away of a minor child against the will of the father — the corporation is liable; or, in the case just supposed, it may be sued by the father¹ for the child's services.²

§ 733. *Ultra Vires*. — The foregoing expositions assume that a corporation is not responsible for what its officers and agents do outside of the corporate sphere. And in a general way this is true.³ But in whatever matter a corporation has the power to act, if it proceeds wrongfully⁴ it is chargeable with the resulting mischief. And, beyond this, there is a difference between what a particular agent does in excess of the charter authority, and the corporation's extending its functions beyond the law's interpretation of them. When it does the latter, and on the forbidden ground incurs liabilities, it is estopped, in a suit to enforce them, to deny the corporate power.⁵ So that it may be held to answer for wrongs which it commits outside of its true sphere.⁶ Thus, if a city authorized to build a particular sort of road builds a different one instead, it is liable to a traveller for injuries suffered through a defect in the one it has constructed.⁷ And if a steam railroad runs street horse cars extra its powers, it must pay the damages to a person injured through their mismanagement.⁸

334; *Reed v. Home Savings Bank*, 130 Mass. 443; *Pennsylvania Co. v. Weddle*, 100 Ind. 138; *Morton v. Metropolitan Life Ins. Co.* 34 Hun, 366; *Newark Coal Co. v. Upson*, 40 Ohio State, 17; *Boogher v. Life Assoc. of Am.* supra; *Evansville, &c. Rld. v. McKee*, supra; *Wheeler, &c. Manuf. Co. v. Boyce*, 36 Kan. 350; *Iron Mountain Bank v. Mercantile Bank*, 4 Mo. Ap. 505; *Woodward v. St. Louis, &c. Ry.* 85 Mo. 142; *Wheless v. Second Nat. Bank*, 1 Baxter, 469.

¹ Ante, § 374.

² *Grand Rapids, &c. Rld. v. Showers*, 71 Ind. 451.

³ *Bishop Con.* § 1012; *Poulton v. London, &c. Ry.* Law Rep. 2 Q. B.

534; *Weckler v. First National Bank*, 42 Md. 581; *Lemon v. Newton*, 134 Mass. 476; *Pierce v. Tripp*, 13 R. I. 181.

⁴ Ante, § 723.

⁵ *Bishop Con.* § 286, 304, 310, 1023, compared; *Salt Lake City v. Hollister*, 118 U. S. 256.

⁶ *Alexander v. Relfe*, 74 Mo. 495; *Philadelphia, &c. Rld. v. Quigley*, 21 How. U. S. 202.

⁷ *Pekin v. Newell*, 26 Ill. 320.

⁸ *New York, &c. Ry. v. Haring*, 18 Vroom, 137, *Beasley, C. J.* observing: "The doctrine of *ultra vires* does not apply to torts of this nature. It would indeed be an anomalous result in legal science if a corporation should be per-

§ 734. **Exemplary Damages.** — It results from the foregoing views, that, in whatever circumstances an individual tort-feasor would be liable for exemplary damages, a corporation will be so also,¹ — a rule perhaps not extending to municipal corporations.²

II. *Business Corporations.*

§ 735. **Doctrines Applicable.** — The doctrines of the sub-title just closed are emphatically applicable to business corporations; such as those for manufacturing, mining, trading, the running of railroads, and the like. As to them, —

§ 736. **The Rule** — is, that, with no exceptions requiring mention, they have within their respective spheres the same rights, and are subject to the same responsibilities for their wrongs, as natural persons.³ Thus, in respect to the same subject matter, railroads and private individuals are required to exercise the same care in preventing injuries to others.⁴ And —

§ 737. **Notice** — to the proper officer of a corporation is notice to the corporation.⁵

mitted to set up that, inasmuch as a branch of the business prosecuted by it was wrongful, therefore all the special wrongs done to individuals in the course of it were remediless. But in such situations corporate bodies, like individuals, cannot take advantage of their own wrong by way of defence. If corporations are not to be held responsible for injuries to persons done in the transaction of a series of wrongful acts, such an immunity would have a wide scope. All wrongs done by such bodies are, in a sense, *ultra vires*, and if the want of a franchise to do the tortious act be a defence, then corporations have a dispensation from liability for these acts peculiar to themselves." p. 138. But see *Horn v. Baltimore*, 30 Md. 218.

¹ *Wheeler, &c. Manuf. Co. v. Boyce*, 36 Kan. 350; *Lake Shore, &c. Ry. v. Rosenzweig*, 3 Am. Pa. 519; *Hays v. Houston, &c. Rld.* 46 Texas, 272; *Atlantic, &c. Ry. v. Dunn*, 19 Ohio State, 162; *Pittsburg, &c. Rld. v. Shusser*, 19 Ohio State, 157.

² *Chicago v. Martin*, 49 Ill. 241.

³ *Chicago, &c. Rld. v. Gasaway*, 71 Ill. 570; *Knell v. United States and Brazil Steams. Co.* 33 N. Y. Sup. 423.

⁴ *Ohio, &c. Rld. v. Shanefelt*, 47 Ill. 497; *French v. Buffalo, &c. Rld.* 2 Abb. Ap. 196.

⁵ *Baltimore, &c. Rld. v. McKenzie*, 81 Va. 71; *Stiles v. Cardiff Steam Nav. Co.* 10 Jur. n. s. 1199.

III. *Municipal Corporations.*

§ 738. *Distinguished from others.* — The special features of a municipal corporation are two. One is that, instead of the corporate body¹ being composed of persons selected from the community at large, they are the fluctuating and changing inhabitants² of a particular locality; commonly a city, but it may be a village, a township, or a county. The other is, that its leading function is governmental; consisting of legislative, of *quasi* legislative, and largely of administrative and executive powers. At the same time, it may be, and incidentally it in most instances is, the owner and manager of property. Its invisible part — usually spoken of as constituting the whole of a corporation, and being in justness of language as truly the whole of it as the invisible man is the whole of him, while his body is only valueless dust — differs from that of other corporations simply as to its objects and methods. Hence, —

§ 739. *Defined.* — A municipal corporation is an authorization cast by law upon the inhabitants of a specified locality to exercise in things local, subordinately to the State jurisdiction, particular limited powers of self-government, legislative, supervisory, or directive, and often or commonly judicial; added to which, it may have collaterally any other corporate functions deemed by the creator of it desirable.³

¹ Ante, § 720.

² Whether all or what part of such inhabitants depends on the terms of the charter or incorporating act; usually, with us, all, or all the legal voters. But it is not essential to a municipal corporation that all the inhabitants should be corporators, or burgesses, *Rex v. West Looe*, 3 B. & C. 677, or especially that resident foreigners should be, *Bodwic v. Fennell*, 1 Wils. 233. Probably a charter will not be construed to include infants as corporators, unless they are made such by specific words. *Rex v. Carter, Cowp.* 220.

³ Municipal corporations are some-

times called public corporations. Kent says they "are such as are created by the government for political purposes, as counties, cities, towns, and villages; they are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good; and such powers are subject to the control of the legislature of the State." 2 Kent Com. 275. Dillon observes, that these corporations are "established by law to share in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town, or district which is incorporated." Dillon Mun. Corp. 2d ed. § 9 b. He cites,

§ 740. **How Sued.** — Commonly a municipal corporation sues and is sued under the same forms of law as an individual.¹ Now, —

§ 741. **Further of Nature.** — We have here an artificial being with functions selected, not from those of any one natural man,² but from those of the private citizen, of the legislator, the judge, and the executive officer, and perhaps functions which have not exact counterparts in any unincorporate person. Moreover, this artificial creature of a statute varies with the differing terms of its charter, with its varying composite parts, and even in some measure with its surroundings. Again, the opinions of courts upon it, in cases apparently the same, differ. So that these corporations present to the investigator complications often not a little embarrassing. Hereupon —

§ 742. **How these Elucidations.** — The author, assuming the reader to be inquiring for the law of his own State, which may differ from that of every other, and conscious that a minute examination of the statutes and decisions of all the States would too much crowd this chapter, will, instead of attempting the impossible, here set down, with illustrations, some leading principles which may guide his separate investigations through his own local law. Thus, —

§ 743. **Summary.** — Looking alike into the reasonings of the law and the specific adjudications, and following the latter where uniform, yet seeking aid from the former where the decisions differ, we find the doctrine to be, that, in things committed to the discretion of a municipal corporation, including its legislative, judicial, and governmental functions generally, it is never answerable to the individual for the ill consequences of its honest mistakes, or for ill conduct however gross in matters strictly legislative or judicial.³ In its executive and ministerial doings, as distinguished from the acts of officers clothed with independent powers, it is responsible

among other places, *People v. Morris*, Fennell, 1 Wils. 233. See *Rock Island* 13 Wend. 325, 333, 334, and *People v. Steele*, 31 Ill. 543.
Hurlbut, 24 Mich. 44.

² Ante, § 719, 720.

¹ *Winslow v. Perquimans*, 64 N. C. 218; *Hamilton v. Carthage*, 24 Ill. 22; *Willis v. Legris*, 45 Ill. 289; *Bodwic v.*
³ *Rivers v. Augusta*, 65 Ga. 376; *Evansville v. Decker*, 84 Ind. 325; *Lafayette v. Timberlake*, 88 Ind. 330.

for its trespasses and other like wrongs to individuals and their rights, and for its negligence.¹ For the misdoings and neglects of its agents, including those officers who act under its direct command as its agents,² it is liable; but not³ for the ill conduct of independent officers, even though it appointed them.⁴ Some of the particulars are —

¹ *Rivers v. Augusta*, supra; *Brown v. Atlanta*, 66 Ga. 71.

² *Danbury, &c. Rld. v. Norwalk*, 37 Conn. 109; *Champaign v. Patterson*, 50 Ill. 61.

³ *School District v. Williams*, 38 Ark. 454; *McElroy v. Albany*, 65 Ga. 387; *Waller v. Dubuque*, 69 Iowa, 541.

⁴ The following are among the later cases, whether for or against the several propositions of the text. There are other cases, but those here cited will enable the reader to find most of them : —

United States. — *Weightman v. Washington*, 1 Black, 39; *Chicago v. Robbins*, 2 Black, 418; *Nebraska City v. Campbell*, 2 Black, 590; *Barnes v. District of Columbia*, 91 U. S. 540; *Transportation Co. v. Chicago*, 99 U. S. 635; *Louisiana v. New Orleans*, 109 U. S. 285; *Johnston v. District of Columbia*, 118 U. S. 19; *Arn v. Kansas*, 14 Fed. Rep. 236; *Delger v. St. Paul*, 14 Fed. Rep. 567; *Trescott v. Waterloo*, 26 Fed. Rep. 592; *Johnston v. District of Columbia*, 1 Mackey, 427; *Bannagan v. District of Columbia*, 2 Mackey, 285; *McGill v. District of Columbia*, 4 Mackey, 70.

Alabama. — *Barbour v. Horn*, 48 Ala. 649; *Askew v. Hale*, 54 Ala. 639; *Selma v. Perkins*, 68 Ala. 145; *Grider v. Tally*, 77 Ala. 422; *Greene v. Eubanks*, 80 Ala. 204.

Arkansas. — *School District v. Williams*, 38 Ark. 454.

California. — *Tranter v. Sacramento*, 61 Cal. 271; *Lehn v. San Francisco*, 66 Cal. 76.

Connecticut. — *Manchester v. Hartford*, 30 Conn. 118; *Danbury, &c. Rld. v. Norwalk*, 37 Conn. 109; *Raymond*

v. Fish, 51 Conn. 80; *Cloughessey v. Waterbury*, 51 Conn. 405; *Brouson v. Wallingford*, 54 Conn. 513.

Dakota. — *Larson v. Grand Forks*, 3 Dak. 307.

Delaware. — *Magarity v. Wilmington*, 5 Houst. 530.

Florida. — *Jacksonville v. Drew*, 19 Fla. 106.

Georgia. — *Rome v. Omberg*, 28 Ga. 46; *Savannah v. Cullens*, 38 Ga. 334; *Parker v. Macon*, 39 Ga. 725; *Rome v. Dodd*, 58 Ga. 238; *McElroy v. Albany*, 65 Ga. 387; *Brown v. Atlanta*, 66 Ga. 71; *Savannah v. Spears*, 66 Ga. 304; *Savannah v. Cleary*, 67 Ga. 153; *Simon v. Atlanta*, 67 Ga. 618; *Gaskins v. Atlanta*, 73 Ga. 746; *Butler v. Thomasville*, 74 Ga. 570; *Atlanta v. Dooly*, 74 Ga. 702; *Smith v. Atlanta*, 75 Ga. 110.

Illinois. — *Bloomington v. Bay*, 42 Ill. 503; *Chicago v. Martin*, 49 Ill. 241; *Springfield v. Le Claire*, 49 Ill. 476; *Champaign v. Patterson*, 50 Ill. 61; *Mechanicsburg v. Meredith*, 54 Ill. 84; *Quincy v. Jones*, 76 Ill. 231; *Schmidt v. Chicago, &c. Ry.* 83 Ill. 405; *Chicago v. Murphy*, 84 Ill. 224; *Wilcox v. Chicago*, 107 Ill. 334; *Chicago v. Keefe*, 114 Ill. 222; *Joliet v. Conway*, 119 Ill. 489.

Indiana. — *Indianapolis v. Huffer*, 30 Ind. 235; *Grove v. Fort Wayne*, 45 Ind. 429; *Centerville v. Woods*, 57 Ind. 192; *Weis v. Madison*, 75 Ind. 241; *Huntington v. Breen*, 77 Ind. 29; *Yeager v. Tippecanoe*, 81 Ind. 46; *Evansville v. Decker*, 84 Ind. 325; *Evansville v. Wilter*, 86 Ind. 414; *Washington v. Small*, 86 Ind. 462; *Robinson v. Evansville*, 87 Ind. 334; *Lafayette v. Timberlake*, 88 Ind. 330;

§ 744. **By-laws.** — The direct legislative function of a municipal corporation consists of the making of by-laws, other-

Madison v. Brown, 89 Ind. 48; *North Vernon v. Voegler*, 89 Ind. 77; *Rozell v. Anderson*, 91 Ind. 591; *Turner v. Indianapolis*, 96 Ind. 51; *Aurora v. Bitner*, 100 Ind. 396; *Leeds v. Richmond*, 102 Ind. 372; *Fulton v. Rickel*, 106 Ind. 501; *Fort Wayne v. Coombs*, 107 Ind. 75; *Rushville v. Adams*, 107 Ind. 475; *Rice v. Evansville*, 108 Ind. 7; *Knox v. Montgomery*, 109 Ind. 69; *Taber v. Grafmiller*, 109 Ind. 206; *Howard v. Legg*, 110 Ind. 479.

Iowa. — *Albee v. Floyd*, 46 Iowa, 177; *Hendershott v. Ottumwa*, 46 Iowa, 658; *Clark v. Epworth*, 56 Iowa, 462; *Beazan v. Mason City*, 58 Iowa, 233; *Lane v. Woodbury*, 58 Iowa, 462; *Sikes v. Manchester*, 59 Iowa, 65; *Ball v. Woodbine*, 61 Iowa, 83; *Green v. Harrison*, 61 Iowa, 311; *Van Winter v. Henry*, 61 Iowa, 684; *Freburg v. Davenport*, 63 Iowa, 119; *Duffy v. Dubuque*, 63 Iowa, 171; *Callahan v. Des Moines*, 63 Iowa, 705; *Cook v. Anamosa*, 66 Iowa, 427; *Cooper v. Mills*, 69 Iowa, 350; *Waller v. Dubuque*, 69 Iowa, 541.

Kansas. — *Leavenworth v. Casey*, *McCahon*, 124; *Osborne v. Hamilton*, 29 Kan. 1; *Eudora v. Miller*, 30 Kan. 494.

Kentucky. — *Hammar v. Covington*, 3 Met. Ky. 494; *Wheatly v. Mercer*, 9 Bush, 704; *Pollock v. Louisville*, 13 Bush, 221; *Greenwood v. Louisville*, 13 Bush, 226; *Pearson v. Zable*, 78 Ky. 170; *Joyce v. Woods*, 78 Ky. 386.

Maine. — *Morgan v. Hallowell*, 57 Maine, 375; *Ham v. Wales*, 58 Maine, 222; *Lynde v. Rockland*, 66 Maine, 309; *Perkins v. Oxford*, 66 Maine, 545; *Liberty v. Hurd*, 74 Maine, 101; *Frazer v. Lewiston*, 76 Maine, 531; *Burrill v. Augusta*, 78 Maine, 118.

Maryland. — *Eyler v. Allegany*, 49 Md. 257; *Sinclair v. Baltimore*, 59 Md. 592; *Prince George v. Burgess*, 61 Md. 29; *Perry v. House of Refuge*, 63 Md. 20; *Taylor v. Cumberland*, 64 Md. 68;

Kranz v. Baltimore, 64 Md. 491; *Smith v. Stephan*, 66 Md. 381.

Massachusetts. — *Riddle v. Proprietors of Locks*, 7 Mass. 169; *Hafford v. New Bedford*, 16 Gray, 297; *Baker v. Dedham*, 16 Gray, 393; *Pollard v. Woburn*, 104 Mass. 84; *Fisher v. Boston*, 104 Mass. 87; *Brooks v. Somerville*, 106 Mass. 271; *Hawks v. Charlemont*, 107 Mass. 414; *Bemis v. Arlington*, 114 Mass. 507; *Hill v. Boston*, 122 Mass. 344; *Tainter v. Worcester*, 123 Mass. 311; *Rouse v. Somerville*, 130 Mass. 361; *Worden v. New Bedford*, 131 Mass. 23; *Deane v. Randolph*, 132 Mass. 475; *Lemon v. Newton*, 134 Mass. 476; *Manners v. Haverhill*, 135 Mass. 165; *Sullivan v. Holyoke*, 135 Mass. 273; *Perkins v. Lawrence*, 136 Mass. 305; *Tindley v. Salem*, 137 Mass. 171; *Morse v. Worcester*, 139 Mass. 389; *Cavanagh v. Boston*, 139 Mass. 426; *Benton v. Boston City Hospital*, 140 Mass. 13; *Commonwealth v. Cheney*, 141 Mass. 102; *Post v. Boston*, 141 Mass. 189; *Hanscom v. Boston*, 141 Mass. 242; *Waldron v. Haverhill*, 143 Mass. 582.

Michigan. — *Dewey v. Detroit*, 15 Mich. 307; *Leoni v. Taylor*, 20 Mich. 148; *Detroit v. Beckman*, 34 Mich. 125; *Lansing v. Toolan*, 37 Mich. 152; *Medina v. Perkins*, 48 Mich. 67; *Dotton v. Albion*, 50 Mich. 129; *Burford v. Grand Rapids*, 53 Mich. 98; *Agnew v. Corunna*, 55 Mich. 428; *Stebbins v. Keene*, 55 Mich. 552; *McKellar v. Detroit*, 57 Mich. 158.

Minnesota. — *Shartle v. Minneapolis*, 17 Minn. 308; *Altnow v. Sibley*, 30 Minn. 186; *Nichols v. Minneapolis*, 30 Minn. 545; *Bohen v. Waseca*, 32 Minn. 176; *Noonan v. Stillwater*, 33 Minn. 198; *Bryant v. St. Paul*, 33 Minn. 289; *Kellogg v. Janesville*, 34 Minn. 132; *Grube v. St. Paul*, 34 Minn. 402; *Peters v. Fergus Falls*, 35 Minn. 549.

Missouri. — *Murtaugh v. St. Louis*, 44 Mo. 479; *Welsh v. St. Louis*, 73

wise termed ordinances, — explained by the author in another work.¹ It is in the nature of a legislative power that neither

Mo. 71; Russell v. Columbia, 74 Mo. 480; Rowland v. Gallatin, 75 Mo. 134; Broadwell v. Kansas, 75 Mo. 213; Loewer v. Sedalia, 77 Mo. 431; Armstrong v. Brunswick, 79 Mo. 319; Stewart v. Clinton, 79 Mo. 603; Myers v. St. Louis, 82 Mo. 367; Blumb v. Kansas, 84 Mo. 112; Ferrenbach v. Turner, 86 Mo. 416; Kiley v. Kansas, 87 Mo. 103; Grogan v. Broadway Foundry Co. 87 Mo. 321; Worley v. Columbia, 88 Mo. 106; Carrington v. St. Louis, 89 Mo. 208; Squires v. Chilli-cothe, 89 Mo. 226; Schweickhardt v. St. Louis, 2 Mo. Ap. 571.

New Hampshire. — Sides v. Portsmouth, 59 N. H. 24; Parker v. Nashua, 59 N. H. 402; Wakefield v. Newport, 60 N. H. 374; Vale Mills v. Nashua, 63 N. H. 136.

New Jersey. — Pray v. Jersey City, 3 Vroom, 394; Condict v. Jersey City, 17 Vroom, 157; Wild v. Paterson, 18 Vroom, 406; Field v. West Orange, 9 Stew. Ch. 118.

New York. — Hume v. New York, 47 N. Y. 639; Byrnes v. Cohoes, 67 N. Y. 204; Ham v. New York, 70 N. Y. 459; Urquhart v. Ogdensburg, 91 N. Y. 67; Moore v. Gadsden, 93 N. Y. 12; Cain v. Syracuse, 95 N. Y. 83; Lewis v. The State, 96 N. Y. 71; Walsh v. New York, &c. Bridge, 96 N. Y. 427; Goodfellow v. New York, 100 N. Y. 15; Everson v. Syracuse, 100 N. Y. 577; Seifert v. Brooklyn, 101 N. Y. 136; Pomfrey v. Saratoga Springs, 104 N. Y. 459; Monk v. New Utrecht, 104 N. Y. 552; Rutherford v. Holley, 105 N. Y. 632; East River Gas-light Co. v. Donnelly, 25 Hun, 614; Hiller v. Sharon Springs, 28 Hun, 344; Vincent v. Brooklyn, 31 Hun, 122; Dressell v. Kingston, 32 Hun, 533; Herrington v. Lansingburgh, 36 Hun, 598; Hooker v. Rochester, 37 Hun, 181; Tierney v. Troy, 41 Hun,

120; Walsh v. New York, 41 Hun, 299; Clark v. Rochester, 43 Hun, 271; Richards v. New York, 48 N. Y. Super. 315; Stillwell v. New York, 49 N. Y. Super. 360; Haskell v. Penn Yan, 5 Lans. 43; Clarissy v. Metropolitan Fire Dep. 7 Abb. Pr. n. s. 352; Rein-hard v. New York, 2 Daly, 243; Don-ohue v. New York, 3 Daly, 65; Duryea v. New York, 10 Daly, 300.

North Carolina. — Winslow v. Per-quimans, 64 N. C. 218; Burwell v. Vance, 93 N. C. 73.

Ohio. — McCombs v. Akron, 15 Ohio, 474; Wheeler v. Cincinnati, 19 Ohio State, 19; Finch v. Toledo, 30 Ohio State, 37; Ironton v. Kelley, 38 Ohio State, 50; Springfield v. Spence, 39 Ohio State, 665; Toledo v. Cone, 41 Ohio State, 149; Robinson v. Green-ville, 42 Ohio State, 625; Cohen v. Cleveland, 43 Ohio State, 190.

Oregon. — McCalla v. Multnomah, 3 Oregon, 424; O'Harra v. Portland, 3 Oregon, 525; Mack v. Salem, 6 Oregon, 275.

Pennsylvania. — Erie City v. Schwin-gle, 10 Harris, Pa. 384; Carr v. North-ern Liberties, 11 Casey, Pa. 324; Allen-town v. Kramer, 23 Smith, Pa. 406; Mahanoy v. Scholly, 3 Norris, Pa. 136; Erie v. Caulkins, 4 Norris, Pa. 247; Collins v. Philadelphia, 12 Norris, Pa. 272; Scranton v. Catterson, 13 Norris, Pa. 202; Mauch Chunk v. Kline, 4 Out. Pa. 119; Kibele v. Philadelphia, 9 Out. Pa. 41; Chartiers v. Langdon, 4 Am. Pa. 541.

Rhode Island. — Taylor v. Peckham, 8 R. I. 349; Aldrich v. Tripp, 11 R. I. 141; Williams v. Tripp, 11 R. I. 447; Inman v. Tripp, 11 R. I. 520; Pierce v. Tripp, 13 R. I. 181.

South Carolina. — Young v. Charles- ton, 20 S. C. 116; Gibbes v. Beaufort, 20 S. C. 213.

Tennessee. — Nashville v. Brown, 9

¹ Bishop Written Laws, § 11 a, 17 a, 18-26.

the individual legislators,¹ nor the political body for which they act, can be compelled to pay damages to one aggrieved either by their legislating or their declining to legislate. Therefore a person who has suffered from the non-existence of a municipal by-law, or from the enactment of an injurious one within the authority of the municipality, can have no remedy against the corporation or its officers.²

§ 745. **Judicial.**—The direct judicial powers are exercised by the corporation court. And one injured by a wrongful judicial act, within the jurisdiction of the tribunal, cannot bring his private suit against the judge, the appointing officers, or the municipality,³—a doctrine more particularly explained in the next chapter.⁴

§ 746. **Quasi Legislative or Judicial — (Plans of Work, &c.).**
—An act which is neither strictly legislative nor strictly ju-

Heisk. 1; *McCrowell v. Bristol*, 5 Lea, 685; *Knoxville v. Bell*, 12 Lea, 157; *Theilan v. Porter*, 14 Lea, 622.

Texas.—*Fort Worth v. Crawford*, 64 Texas, 202; *Aaron v. Broiles*, 64 Texas, 316.

Vermont.—*Parker v. Rutland*, 56 Vt. 224; *Welsh v. Rutland*, 56 Vt. 228; *Noble v. St. Albans*, 56 Vt. 522.

Virginia.—*Orme v. Richmond*, 79 Va. 86; *Kehrer v. Richmond*, 81 Va. 745.

Washington.—*Hutchinson v. Olympia*, 2 Wash. 314.

West Virginia.—*Mendel v. Wheeling*, 28 W. Va. 233.

Wisconsin.—*Ward v. Jefferson*, 24 Wis. 342; *Goodnough v. Oshkosh*, 24 Wis. 549; *Kittredge v. Milwaukee*, 26 Wis. 46; *Hawes v. Fox Lake*, 33 Wis. 438; *Dore v. Milwaukee*, 42 Wis. 108; *Little v. Madison*, 42 Wis. 643; *Allen v. Chippewa Falls*, 52 Wis. 430; *Durkee v. Kenosha*, 59 Wis. 123; *Gilluly v. Madison*, 63 Wis. 518; *Spearbracker v. Larrabee*, 64 Wis. 573; *Mulcairns v. Janesville*, 67 Wis. 24; *Hubbell v. Viroqua*, 67 Wis. 343.

Wyoming.—*Kent v. Cheyenne*, 2 Wy. 6.

¹ 1 Bishop Crim. Law, § 461, 462.

² *Rivers v. Augusta*, 65 Ga. 376; *Young v. Charleston*, 20 S. C. 116; *Kent v. Cheyenne*, 2 Wy. 6. See *Taylor v. Cumberland*, 64 Md. 68; *Anne Arundel v. Duckett*, 20 Md. 468; *Motz v. Detroit*, 18 Mich. 495; *Ex parte Albany*, 23 Wend. 277. *Cooley*, Torts, 620, illustrates the principle thus: "One shows no ground of action whatever when he complains that he has suffered damage because the city he resides in has made insufficient provision for protection against fire, or because cattle are not prohibited from running at large, or because 'coasting' in the highways is not prevented, or because the operation of an ordinance which prohibits the explosion of fireworks within the city is temporarily suspended, or because provision is not made for lighting the streets."

³ 1 Bishop Crim. Law, § 460, 462; *Grider v. Tally*, 77 Ala. 422; *Grove v. Van Duyn*, 15 Vroom, 654; *Cooke v. Bangs*, 31 Fed. Rep. 640; *Bell v. McKinney*, 63 Missis. 187; *Heard v. Harris*, 68 Ala. 43; *Johnston v. Moorman*, 80 Va. 131; *McCall v. Cohen*, 16 S. C. 445; *Trescott v. Waterloo*, 26 Fed. Rep. 592.

⁴ Post, § 779 et seq.

dicial may so far partake of the special nature of the one or the other or both, that the doer will not be liable for any harm resulting therefrom to an individual.¹ This doctrine, stated in these general terms, is abundantly established; but any attempt at more exact defining would lead us into conflicting opinions and uncertainties. In the locating of sewers, in determining their dimensions, and the like, as distinguished from the subsequent carrying out of the plans, a municipal corporation is commonly deemed to act legislatively and judicially; so is not liable to an individual who suffers from an error of judgment therein,² — even, possibly, in some circumstances, though the mistake is the product of negligence.³ A doctrine thus broad was applied to the organizing and regulating of a city's water-works; resulting in relieving the city from liability for the burning of a water-taker's building, which would have been avoided had not the supply pipe been obstructed by mud through the negligence of its agents,⁴ but for this conclusion other reasons might perhaps as well or better be assigned.⁵ And still the proposition appears to be established, that the plans and systems for municipal improvements are of the *quasi* legislative and judicial sort, for errors wherein the municipality is not liable, however they may result in private injury.⁶ But this doctrine has in some cir-

¹ *Anne Arundel v. Duckett*, 20 Md. 468; *Stewart v. New Orleans*, 9 La. An. 461; *Bennett v. New Orleans*, 14 La. An. 120; *Wilson v. New York*, 1 Denio, 595.

² *Savannah v. Spears*, 66 Ga. 304; *Mills v. Brooklyn*, 32 N. Y. 489; *Carr v. Northern Liberties*, 11 Casey, Pa. 324; *Rice v. Evansville*, 108 Ind. 7; *Rozell v. Anderson*, 91 Ind. 591; *Stewart v. Clinton*, 79 Mo. 603; *Collins v. Philadelphia*, 12 Norris, Pa. 272; *Monk v. New Utrecht*, 104 N. Y. 552; *Evansville v. Decker*, 84 Ind. 325; *Indianapolis v. Huffer*, 30 Ind. 235.

³ See post, § 748.

⁴ *Mendel v. Wheeling*, 28 W. Va. 233.

⁵ For example, in the like case of *Tainter v. Worcester*, 123 Mass. 311.

And see *Atkinson v. Newcastle, &c. Waterworks*, 2 Ex. D. 441, there referred to. See also *Ironton v. Kelley*, 38 Ohio State, 50; *Patch v. Covington*, 17 B. Monr. 722. An obvious reason would be, that the burning did not proceed from the obstructed water-pipe, but from a separate source for which the city was not responsible. And it is not a natural and probable or any other consequence of mud in a water-pipe that somebody's careless handling of fire will communicate it to a building.

⁶ *Johnston v. District of Columbia*, 118 U. S. 19; *Carr v. Northern Liberties*, supra; *Larkin v. Saginaw*, 11 Mich. 88; *Pontiac v. Carter*, 32 Mich. 164; *Detroit v. Beckman*, 34 Mich. 125; *Bannagan v. District of Columbia*,

cumstances and by some tribunals been qualified; so as, for example, to render the city responsible for damages from a sewer proved to be insufficient, it having the means to make the needed changes therein.¹ Another illustration is in the—

§ 747. **Letting of Contracts.**—Where it was the charter duty of a city to let its contracts to the lowest responsible bidder, this act was held to be judicial; therefore an action would not lie against the city for its erroneous or even corrupt performance.² It is in the nature of legislative and judicial functions that they are an exercise of the judgment, so in an important sense they are—

§ 748. **Discretionary.**—A municipal corporation, an officer, or a private individual, intrusted with a discretion to do or not to do, or to execute a thing in a manner which it or he deems best, is not responsible for the ill consequences of a careful and honest exercise of the discretion; for this is implied in the terms of the discretion itself.³ But, though there may be doubt from the language of some of the cases, in reason and by the better authorities if the discretion is not too closely of the legislative or judicial sort,⁴ its corrupt or even negligent exercise will carry liability to the person injured.⁵ Thus, if a city, authorized to permit or exclude public shows, licenses an exhibition in its streets of two bears, knowing it to be calculated to frighten horses and endanger life and property, the municipality is answerable to a person injured by horses taking fright thereat.⁶ And if a city exercises its

2 Mackey, 285; *Urquhart v. Ogdensburg*, 91 N. Y. 67; *Lansing v. Toolan*, 37 Mich. 152.

¹ *Seifert v. Brooklyn*, 101 N. Y. 136. But see *Springfield v. Spence*, 39 Ohio State, 665. And see *Lehn v. San Francisco*, 66 Cal. 76; *Weightman v. Washington*, 1 Black, 39.

² *East River Gas-light Co. v. Donnelly*, 25 Hun, 614.

³ *Magarity v. Wilmington*, 5 Houst. 530; *Wilson v. New York*, 1 Denio, 595, 599, 600; *Mills v. Brooklyn*, 32 N. Y. 489, 495; *Stockton, &c. Ry. v. Brown*, 9 H. L. Cas. 246, 6 Jur. N. S.

1168; In re *Brown*, 29 Ch. D. 889; *Wilkinson v. Hull, &c. Co.* 20 Ch. D. 323, 331; *Burwell v. Vance*, 93 N. C. 73; *Cain v. Syracuse*, 95 N. Y. 83; *Goodrich v. Chicago*, 20 Ill. 445; *Barton v. Syracuse*, 37 Barb. 292; *Baker v. The State*, 27 Ind. 485.

⁴ See ante, § 746.

⁵ Ante, § 104, 115, 117, 118, 150, 179; *Reynolds v. Shreveport*, 13 La. An. 426; *Bennett v. New Orleans*, 14 La. An. 120.

⁶ *Little v. Madison*, 42 Wis. 643. And see *Rushville v. Adams*, 107 Ind. 475.

right to remove a person infected with small-pox, by needlessly conveying him in bad weather to a tent where his sickness is aggravated, it may be compelled to pay him damages.¹ Mere permissive words in a statute are not as of course interpreted to carry a discretion; if, for example, they confer on a third person a right, he may avail himself of it, and thus the statute becomes mandatory.² And there are other cases within this principle.³ On the other hand, there may be imperative terms which should be construed as discretionary.⁴ And considerations of the nature of a municipal corporation may lead to the discretionary rendering of a power; as, that the corporation is an instrument in part—

§ 749. **Governmental.**—One of the most obvious propositions of reason as well as of authority is, that a municipal corporation is a subordinate branch, or part, of the government.⁵ It has other functions, but those of this class are, of course, discretionary.⁶ Now, in numerous cases, beyond what need be referred to here, it is assumed that, therefore, the corporation is not answerable for its negligence in the discharge of those functions.⁷ We shall see as we proceed, that other authorities do not so hold. One of the reasons apparently swaying the judicial mind toward this opinion is, that the supreme governmental power, the State, cannot be sued without its consent.⁸ But when we look into this reason we perceive,

¹ *Aaron v. Broiles*, 64 Texas, 316.

² *Bishop Written Laws*, § 112; *Martin v. Brooklyn*, 1 Hill, N. Y. 545.

³ *People v. Albany*, 11 Wend. 539; *People v. Otsego*, 51 N. Y. 401.

⁴ *Western College v. Cleveland*, 12 Ohio State, 375.

⁵ *Barnes v. District of Columbia*, 91 U. S. 540; *Altnow v. Sibley*, 30 Minn. 186, 189; *Lane v. Woodbury*, 58 Iowa, 462; *Louisiana v. New Orleans*, 109 U. S. 285, 287.

⁶ *Ante*, § 748.

⁷ *Hamilton v. Mighels*, 7 Ohio State, 109; *Pray v. Jersey City*, 3 Vroom, 394; *Winbigler v. Los Angeles*, 45 Cal. 36; *Tranter v. Sacramento*, 61 Cal. 271; *Askew v. Hale*, 54 Ala. 639;

Welsh v. Rutland, 56 Vt. 228; *Wild v. Paterson*, 18 Vroom, 406.

⁸ Not all the cases, perhaps not the majority, put the question quite so. In *Condict v. Jersey City*, 17 Vroom, 157, 160, 161, *Depue, J.* said: "The true principle on which a municipal corporation is exempted from liability in such cases is that given by *Dixon, C. J.* in *Hayes v. Oshkosh*, 33 Wis. 314, that the corporation is engaged in the performance of a public service in which it has no particular interest and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabi-

that the non-liability of the State results from its dignity, which is not possessed by a municipal corporation; and the State has always been deemed as capable of doing an individual a wrong as any private person, and as liable to respond in damages, though its response is of its own grace.¹ In a general way, —

§ 750. **Negligence.** — It is abundantly settled that there is no universal or very wide rule exempting a municipal corporation from liability to private persons for injuries inflicted on them through its negligence; though some courts allow the exemption in special circumstances. In ministerial and administrative or executive affairs, this exemption is never known, but all hold the municipality to be liable.²

tants and the community, and that persons employed in the performance of such duties, though employed by the corporation, act as public officers charged with a public service. To maintain in its integrity the doctrine of our courts that a municipal corporation is not amenable to actions for negligence in the performance of public duties, it is necessary to maintain also that persons employed by the corporation in the execution of public duties are mere agencies or instruments by which such duties are performed, and that the doctrine of *respondeat superior* does not apply to such employments. To impose upon the corporation liability for the negligence of such employees would indirectly fix upon the corporation a liability from which it is by law, on considerations of public policy, exempted." Now, if in a particular case the municipal corporation has a mere appointing power, the universal principles of the law would hold it to the duty of simply executing the power carefully. It would not be liable for the negligence of officers circumspectly chosen. The duty, in such a case, would be that of the officers, not its own. But where the duty is its own, — where, for example, the State itself, if a statute permitted it to be sued, would

be liable, or where a private individual would be, — it is difficult to see how, in reason, there can be any public policy giving to the municipal corporation a magnificence superior to the private corporators, to every other private person, and even to the State itself.

¹ Bishop Con. § 989; Farnell v. Bowman, 12 Ap. Cas. 643; Splittorf v. The State, 108 N. Y. 205; Rexford v. The State, 105 N. Y. 229; Hettihewage Siman Appu v. Queen's Advocate, 9 Ap. Cas. 571.

² Orme v. Richmond, 79 Va. 86; Gilluly v. Madison, 63 Wis. 518; Allentown v. Kramer, 23 Smith, Pa. 406; Toledo v. Cone, 41 Ohio State, 149; Donohue v. New York, 3 Daly, 65; Clarissy v. Metropolitan Fire Dep. 7 Abb. Pr. N. S. 352; Lewis v. The State, 96 N. Y. 71; Morse v. Worcester, 139 Mass. 389; Perkins v. Lawrence, 136 Mass. 305; Worden v. New Bedford, 131 Mass. 23; Van Winter v. Henry, 61 Iowa, 684; Aldrich v. Tripp, 11 R. I. 141; Bailey v. New York, 3 Hill, N. Y. 531; Fort Worth v. Crawford, 64 Texas, 202. In Barnes v. District of Columbia, 91 U. S. 540, 551, Hunt, J. citing a multitude of cases, English and American, says: "The authorities establishing the doctrine that a city is responsible for its mere negligence are

§ 751. **Private Rights.** — A municipal corporation, like an individual, must pay damages to one whose private rights it invades;¹ as, for example, where by the manner of grading a street, constructing a sewer, or otherwise, it turns water on a person's land² or pollutes a private stream.³ And a city that, after licensing one to post bills, tore them down against his remonstrance and without permitting him a hearing, was adjudged to have done him an actionable wrong.⁴ At the same time, within principles already stated,⁵ it is not responsible for injuries consequent upon following the permission or command of a valid statute, or otherwise carefully carrying out its powers.⁶ But for an unnecessary injury it is liable.⁷

§ 752. **Enforcing Laws.** — Not every violation of the laws, civil or criminal, is necessarily to be made the subject of a suit in court. Therefore, assuming a municipality to have the power of prosecution, it has equally a discretion to forbear. For which and other reasons it is not liable to one injured from a violation either of one of its by-laws or of a law of the State.⁸ Thus, a person harmed by an unlawful coasting in the street,⁹ or the riotous discharge of a cannon,¹⁰ or the sending up of fire-works contrary to an ordinance,¹¹ is without remedy against the city. On the same principle, —

§ 753. **Mobs.** — At the common law, if a mob destroys

so numerous, and so well considered, that the law must be deemed to be settled in accordance with them."

¹ *Inman v. Tripp*, 11 R. I. 520; *Cohen v. Cleveland*, 43 Ohio State, 190; *McCombs v. Akron*, 15 Ohio, 474; *Myers v. St. Louis*, 82 Mo. 367; *Witt v. New York*, 5 Rob. N. Y. 248; *Wal-dron v. Haverhill*, 143 Mass. 582.

² *Byrnes v. Cohoes*, 67 N. Y. 204; *North Vernon v. Voegler*, 89 Ind. 77; *Weis v. Madison*, 75 Ind. 241; *Gilluly v. Madison*, 63 Wis. 518; *Vale Mills v. Nashua*, 63 N. H. 136; *Smith v. Atlanta*, 75 Ga. 110; *Butler v. Thomasville*, 74 Ga. 570.

³ *Hooker v. Rochester*, 37 Hun, 181.

⁴ *Atlanta v. Dooly*, 74 Ga. 702.

⁵ *Ante*, § 116-120.

⁶ *Kehrer v. Richmond*, 81 Va. 745; *Williams v. Tripp*, 11 R. I. 447; *Stewart v. Clinton*, 79 Mo. 603; *Arn v. Kansas*, 14 Fed. Rep. 236; *Quincy v. Jones*, 76 Ill. 231; *Rome v. Omberg*, 28 Ga. 46.

⁷ *Ante*, § 115; *Pearson v. Zable*, 78 Ky. 170; *Allentown v. Kramer*, 23 Smith, Pa. 406.

⁸ *Ante*, § 748; *Burford v. Grand Rapids*, 53 Mich. 98; *Levy v. New York*, 1 Sandf. 465; *Lafayette v. Timberlake*, 88 Ind. 330.

⁹ *Lafayette v. Timberlake*, *supra*.

¹⁰ *Robinson v. Greenville*, 42 Ohio State, 625.

¹¹ *Ball v. Woodbine*, 61 Iowa, 83; *Morrison v. Lawrence*, 98 Mass. 219.

property, the owner can have no redress against the municipality that neglected to suppress it.¹ But pretty generally in this country the liability is imposed by statutes.² It is otherwise with various —

§ 754. **Nuisances.** — The creation of a nuisance is ordinarily an affirmative act of wrong to the individual,³ and a municipality doing it must answer to him;⁴ though this liability does not as of course attach to every nuisance within the city.⁵ Nor does its mere failure to abate a nuisance, having the authority,⁶ create responsibility,⁷ it is like any other omission to prosecute a crime. Yet, if a statute distinctly requires the abatement by the city, whether in terms mandatory or in those permissive ones which are construed as mandatory,⁸ its failure to do the duty, upon notice and request, renders it liable to a person injured.⁹

§ 755. **Public and Private, distinguished — Other Distinctions.** — Some courts distinguish between what a municipal corporation does as an arm of the government and for the public good, especially where its powers are derived from a statute applicable alike to all such corporations,¹⁰ and its acts as owner

¹ *Western College v. Cleveland*, 12 Ohio State, 375; *Baltimore v. Poultney*, 25 Md. 107.

² *Darlington v. New York*, 31 N. Y. 164; *Louisiana v. New Orleans*, 109 U. S. 285; *Duryea v. New York*, 10 Daly, 300; *Underhill v. Manchester*, 45 N. H. 214; *Greer v. New York*, 3 Rob. N. Y. 406.

³ *Ante*, § 751; *Fort Worth v. Crawford*, 64 Texas, 202.

⁴ *Pennoyer v. Saginaw*, 8 Mich. 534.

⁵ *Howe v. New Orleans*, 12 La. An. 481; *McCrowell v. Bristol*, 5 Lea, 685; *Hubbell v. Viroqua*, 67 Wis. 343.

⁶ *Theilan v. Porter*, 14 Lea, 622.

⁷ *Armstrong v. Brunswick*, 79 Mo. 319.

⁸ *Ante*, § 748.

⁹ *Grove v. Fort Wayne*, 45 Ind. 429. Doubtless notice and request would not in all cases be an essential preliminary to the action.

¹⁰ In *Bigelow v. Randolph*, 14 Gray, 541, 543, Metcalf, J. said: "This rule . . . is applied, in case of towns, only to the neglect or omission of a town to perform those duties which are imposed on all towns, without their corporate assent, and exclusively for public purposes; and not to the neglect of those obligations which a town incurs, when a special duty is imposed on it, with its consent, express or implied, or a special authority is conferred on it, at its request. In the latter cases, a town is subject to the same liabilities, for the neglect of those special duties, to which private corporations would be, if the same duties were imposed or the same authority were conferred on them, — including their liability for the wrongful neglect as well as the wrongful acts of their officers and agents."

and manager of property held to its own use; exempting it from responsibility in the former case, and casting liability upon it in the latter.¹ Thus, in Massachusetts, a child attending school, in a school-house provided by the city pursuant to general laws, was forbidden compensation for an injury resulting from the unsafe condition of the staircase.² But where the city let rooms in a public building, it was held responsible to a person lawfully there, who was injured through the negligence of its janitor.³ Other distinctions, not all of which need be particularized, abound in the multitude of discordant and conflicting cases found in our American books. We thus have the distinctions between a power conferred by a general and by a special statute,⁴ one extremely thin; between duties imposed by law without any active consent of the corporation, and those which it has asked for or otherwise shown itself willing to assume; and duties which the court deems it paid for, and such as it discharges gratuitously. Further as to which,—

§ 756. **Considered.**—These distinctions assume for the municipal corporation, which we have seen⁵ to be a being created by the law with a part of the powers and capabilities of an individual man, qualities not recognized in any unincorporate person, private or official. And they hold doctrines neither within any terms of the incorporating statutes, nor known elsewhere in the jurisprudence of the common law. And so long as our law is a system of reasoning it must, therefore,

¹ *Oliver v. Worcester*, 102 Mass. 489, 499.

² *Hill v. Boston*, 122 Mass. 344. *Bigelow v. Randolph*, 14 Gray, 541, is of the like sort. See the former case for multitudes of authorities and a wide exposition of the subject.

³ *Worden v. New Bedford*, 131 Mass. 23. In this case, Morton, J. explains the distinction, thus: "A city or town is not liable to a private citizen for an injury caused by any defect or want of repair in a city or town hall or other public building erected and used solely for municipal purposes, or for negligence of its agents in the management of such

buildings. This is because it is not liable to private actions for omission or neglect to perform a corporate duty imposed by general laws upon all cities and towns alike, from the performance of which it derives no compensation. But, when a city or town does not devote such building exclusively to municipal uses, but lets it or a part of it for its own advantage and emolument, by receiving rents, or otherwise, it is liable while it is so let in the same manner as a private owner would be." p. 24.

⁴ See the first note to this section.

⁵ Ante, § 719, 738, 739.

reject them. Thus, it is immaterial to a power, to a liability, or to anything else in the law, whether it originates in the common law, in a general statute, or in a special or private one;¹ so that to introduce this distinction into the law of municipal corporations is simply to inoculate into its body a carbuncle. Again, if the law casts on a person natural or corporate a duty, it is immaterial to its construction or effect whether there was a consideration for it or not. The consideration is a thing pertaining specially to the law of contracts; in express executory simple contracts, it is the law's reason for fixing the duty to perform; but there are contracts wherein no consideration is required, and they are of the same legal force with those based on a consideration.² Moreover, the law in no other department, having cast its obligations on men, construes them in one way if they are willing and in another way if they are unwilling. Finally, in everything else men's obligations are the same to persons whom they injure, whether they are working for the public good or for their own. Hence, —

§ 757. **True Rule.** — Contrary to what we have thus seen to be unfounded in legal reason, the true rule of reason, supported by a part of the adjudged cases, is, that whenever the law casts upon a municipal corporation a duty absolute and not discretionary, it by implication gives to a person specially injured by its non or negligent performance a right of action against the corporation, the same as though³ it were an unincorporate person.⁴ Thus, —

¹ Ante, § 112; Bishop Written Laws, § 4, 7, 86, 88, 89, 116, 117, 123, 139.

² Bishop Con. § 39, 40, 119, 184, 189, 204, 205, 275.

³ Ante, § 132.

⁴ It will be seen that some of the authorities to this proposition are, in the forms of its judicial enunciation, in terms more qualified than those of the text. This sort of qualification is often introduced by the judges, in cases which would stand equally well upon the qualified and the unqualified doctrine, out of abundant caution. But it does not

follow that they deemed the qualification essential; or, if they did, that it is essential in fact. Thus, in *Nebraska City v. Campbell*, 2 Black, 590, 592, Nelson, J., speaking for the Supreme Court of the United States, said: "The law is well settled in respect to public municipal corporations, upon which the duty is imposed to construct and repair or to keep in repair streets or bridges, and upon which is also conferred the means of accomplishing such duty, that they are liable for any special damage arising out of neglect in keeping the

§ 758. **Public Ways.** — If a statute, in terms imperative, or by such permissive words as are construed to be mandatory,¹ casts upon a municipality the obligation to keep the public ways in repair, as it commonly does if it gives it an authority to raise the money required, a person injured through neglect of the duty may have his action against the municipality.²

same in proper condition." Here evidently the clause "upon which is also conferred the means of accomplishing such duty" is not in the absolute sense important, but it is important to the interpretation of the statute relied upon as imposing the duty. If the legislature commands a corporation or private person to repair a street, and puts the means of payment into the hands of another corporation or person, the former becomes by interpretation the mere executive officer to look after the work, while perhaps the duty lies on the latter. But if the looking after the work is required of a corporation or person that is also given the means to pay for it, interpretation will cast upon this corporation or person the duty. So also if the reader, in examining the cases to the proposition in my text, comes, as he will, upon various other qualifying terms, he will find their solution in some principle of interpretation, or in the probability or certainty that they were uttered from mere abundant caution. Not proposing to exhaust here the authorities, I will add: *Weightman v. Washington*, 1 Black, 39; *Robbins v. Chicago*, 4 Wal. 657; *Barnes v. District of Columbia*, 91 U. S. 540; *Alldrich v. Tripp*, 11 R. I. 141; *Conrad v. Ithaca*, 16 N. Y. 158; and the cases cited to the next two sections.

¹ Ante, § 748.

² Cases cited to the last section; *Eudora v. Miller*, 30 Kan. 494; *Jansen v. Atchison*, 16 Kan. 358; *Selma v. Perkins*, 68 Ala. 145, 148; *Parker v. Macon*, 39 Ga. 725; *Delger v. St. Paul*, 14 Fed. Rep. 567; *Madison v. Brown*, 89 Ind. 48; *Fulton v. Rickel*, 106 Ind. 501; *Rushville v. Adams*, 107 Ind.

475; *Knox v. Montgomery*, 109 Ind. 69; *Howard v. Legg*, 110 Ind. 479; *Clark v. Epworth*, 56 Iowa, 462; *Beazan v. Mason City*, 58 Iowa, 233; *Cooper v. Mills*, 69 Iowa, 350; *Fuller v. Atlanta*, 66 Ga. 80; *Hutchinson v. Olympia*, 2 Wash. 314; *Noonan v. Stillwater*, 33 Minn. 198; *Kellogg v. Janesville*, 34 Minn. 132; *Loewer v. Sedalia*, 77 Mo. 431; *Carrington v. St. Louis*, 89 Mo. 208; *Pomfrey v. Saratoga Springs*, 104 N. Y. 459; *McCalla v. Multnomah*, 3 Oregon, 424; *Manchester v. Hartford*, 30 Conn. 118; *Savannah v. Cullens*, 38 Ga. 334; *Browning v. Springfield*, 17 Ill. 143; *Blake v. St. Louis*, 40 Mo. 569; *Hutson v. New York*, 5 Selden, 163; *Wendell v. Troy*, 39 Barb. 329; *Clark v. Lockport*, 49 Barb. 580; *Erie City v. Schwingle*, 10 Harris, Pa. 384; *Knoxville v. Bell*, 12 Lea, 157; *Dewey v. Detroit*, 15 Mich. 307; *Green v. Harrison*, 61 Iowa, 311. In preceding sections, I have perhaps said enough of the contrary authorities. But I will here add a summary of their result as stated by *McIver, J.* in *Young v. Charleston*, 20 S. C. 116, 118: "The true theory upon which these cases rest is that a municipal corporation is a mere governmental agency established for public purposes, and stands upon a very different footing from that of private corporations organized for private gain, or for the special benefit of the corporators. As characterized by *Marshall, C. J.*, in *Fowle v. Alexandria*, 3 Pet. 398, it is 'a legislative corporation established as a part of the government of the country;' and by *Chancellor Harper*, in *White v. Charleston*, 2 Hill, S. C. 571, 575, as 'the agent of the legislature for the purposes of govern-

So just is this principle that in most States wherein it is not held as of common law, it has been enacted by statutes.¹ And —

§ 759. **Sewers.** — The same rule applies in our cities to the keeping of sewers in repair; the duty being cast upon them, they are answerable to persons injured by its neglect.²

§ 760. **Agents, Officers, &c.:** —

Elsewhere. — In the next chapter, we shall consider the rights and liabilities of official persons.

§ 761. **Relation to Officers.** — The mere fact that the power to appoint a particular officer is in a municipal corporation, whether conferred by a law of the State or by one of its own by-laws, does not make the officer its servant, or render it otherwise responsible for his doings.³ Thus, a policeman, whose functions are defined by the law, while his appointment is from the city, is not the city's agent, for whose assaults on third persons, and other wrongful acts in his office, it is answerable.⁴ On this principle, —

§ 762. **Fire Department.** — If, according to what is common in our States, the functions of the fire department are not directly controlled by the city, but it acts independently under the laws, the city, however it may have directed its organization and equipment, is not liable to persons injured by its neglects or other wrongs.⁵ Still, —

ment.' This distinction is fully recognized in *Main v. North Eastern Rld.* 12 Rich. 82. A municipal corporation, thus being a part of the government of the State, is not liable to a civil action by an individual for any damages which he may sustain by reason of its failure to perform any of the public duties imposed upon it, unless the legislature sees fit to provide by statute for such right of action."

¹ *Baker v. Dedham*, 16 Gray, 393; *Pollard v. Woburn*, 104 Mass. 84; *Sears v. Dennis*, 105 Mass. 310; *Smith v. Wakefield*, 105 Mass. 473; *Hill v. Boston*, 122 Mass. 344; *Post v. Boston*, 141 Mass. 189; *Agnew v. Corunna*, 55 Mich. 428; *McKellar v. Detroit*, 57 Mich. 158.

² *Savannah v. Cleary*, 67 Ga. 153; *Fort Wayne v. Coombs*, 107 Ind. 75; *Leeds v. Richmond*, 102 Ind. 372; *Evansville v. Decker*, 84 Ind. 325; *Springfield v. Le Claire*, 49 Ill. 476; *Kranz v. Baltimore*, 64 Md. 491; *Kibele v. Philadelphia*, 9 Out. Pa. 41.

³ *Fisher v. Boston*, 104 Mass. 87; *Hafford v. New Bedford*, 16 Gray, 297; *Wheeler v. Cincinnati*, 19 Ohio State, 19; *Manners v. Haverhill*, 135 Mass. 165; *Worley v. Columbia*, 88 Mo. 106.

⁴ *Buttrick v. Lowell*, 1 Allen, 172; *Pollock v. Louisville*, 13 Bush, 221.

⁵ *Wheeler v. Cincinnati*, 19 Ohio State, 19; *Fisher v. Boston*, 104 Mass. 87; *Tainter v. Worcester*, 123 Mass.

§ 763. **Officers as Agents.** — An officer, whether of the State or of the municipality, and however appointed or chosen,¹ may be the latter's agent, either generally or in the particular instance, so that it will be responsible to third persons for his acts.² But to be such, he must be under its control.³ And it is the rule that, —

§ 764. **Municipality's Agents.** — Whenever the agent of a municipality, being or not an officer also, performs in its name or service an act within the sphere of its liabilities, whether the particular doing was authorized or not, if he therein inflicts a wrong on an individual, the latter may have his action against the corporation, according to the principles⁴ regulating the ordinary relation of master and servant in like cases.⁵ It is otherwise of an act not within the scope of the agent's or officer's authority.⁶ And —

§ 765. **Ultra Vires.** — Commonly, if the corporation authorizes its agent to do an act not within its power or jurisdiction, it is not liable,⁷ — as to which, the ordinary doctrine is believed to apply to municipal corporations, already explained.⁸

IV. *Other Corporations.*

§ 766. **In Nature of Municipal.** — There are corporations in the nature of municipal ones, or *quasi* municipal, to which the

311 ; *Greenwood v. Louisville*, 13 Bush, 226 ; *Burrill v. Augusta*, 78 Maine, 118 ; *Grube v. St. Paul*, 34 Minn. 402 ; *Robinson v. Evansville*, 87 Ind. 334 ; *Wilcox v. Chicago*, 107 Ill. 334.

¹ *Barnes v. District of Columbia*, 91 U. S. 540, 545, 546.

² *Waldron v. Haverhill*, 143 Mass. 582 ; *Kittredge v. Milwaukee*, 26 Wis. 46 ; *Durkee v. Kenosha*, 59 Wis. 123 ; *Mulcairns v. Janesville*, 67 Wis. 24.

³ *Sinclair v. Baltimore*, 59 Md. 592 ; *Ham v. New York*, 70 N. Y. 459. But see *Barnes v. District of Columbia*, supra.

⁴ Ante, § 608-616.

⁵ *Mulcairns v. Janesville*, 67 Wis. 24 ; *Goodfellow v. New York*, 100

N. Y. 15 ; *Murtaugh v. St. Louis*, 44 Mo. 479 ; *Peters v. Fergus Falls*, 35 Minn. 549 ; *Stebbins v. Keene*, 55 Mich. 552 ; *Sullivan v. Holyoke*, 135 Mass. 273 ; *Deane v. Randolph*, 132 Mass. 475 ; *Hawks v. Charlemont*, 107 Mass. 414 ; *Durkee v. Kenosha*, 59 Wis. 123 ; *Waldron v. Haverhill*, 143 Mass. 582.

⁶ *Liberty v. Hurd*, 74 Maine, 101. See *Everson v. Syracuse*, 100 N. Y. 577.

⁷ *Rowland v. Gallatin*, 75 Mo. 134 ; *Wakefield v. Newport*, 60 N. H. 374 ; *Pierce v. Tripp*, 13 R. I. 181 ; *Gibbes v. Beaufort*, 20 S. C. 213 ; *Cavanagh v. Boston*, 139 Mass. 426.

⁸ Ante, § 733.

doctrines of the last sub-title are not so widely applied as there explained. In the words of Hunt, J. speaking in the Supreme Court of the United States, "a distinction is to be noted between the liability of a municipal corporation, made such by the acceptance of a village or city charter, and the involuntary *quasi* corporations known as counties, towns, school districts, and especially the townships of New England. The liability of the former is greater than that of the latter, even when invested with corporate capacity and the power of taxation."¹ This distinction appears in many of the cases;² while, on the other hand, counties and towns, and perhaps school-districts and other like corporations, are in others brought within what in the last sub-title is explained as the better doctrine governing municipal corporations. On some of these questions, there are fundamental differences of judicial opinion, but many of the apparent discords arise from the dissimilar terms of the statutes.³ Referring the reader to the collection of authorities in a preceding section,⁴ the writer here dismisses this branch of the subject.

§ 767. **Others Quasi Public.**—There is room for a considerable expansion of this subject. But the elucidations already given develop the fundamental principles and the methods of reasoning upon them. Therefore it is deemed best not further to prolong the discussion.

§ 768. **Some Cases,**—into which the reader who is thoroughly investigating the subject may desire to look, are referred to in the note.⁵

¹ *Barnes v. District of Columbia*, 91 U. S. 540, 552.

² For example, *Altnow v. Sibley*, 30 Minn. 186; *Askew v. Hale*, 54 Ala. 639; *Lane v. Woodbury*, 58 Iowa, 462; *Finch v. Toledo*, 30 Ohio State, 37.

³ Thus, a township in Indiana is not required to keep the highways in repair, so is not liable to one injured through a want of repair. *Yeager v. Tippecanoe*, 81 Ind. 46. And in Michigan the statutes and consequent decisions are of a like sort as to bridges and culverts. *Leoni v. Taylor*, 20 Mich.

148. But these authorities can have no relevancy to a township on which the statutes have cast this duty. And see *Chartiers v. Langdon*, 4 Am. Pa. 541; *Parker v. Rutland*, 56 Vt. 224.

⁴ Ante, § 743.

⁵ **Board of Health.**—*Kent v. Worthing Local Board*, 10 Q. B. D. 118; *Gibson v. Preston*, Law Rep. 5 Q. B. 218; *Bryant v. St. Paul*, 33 Minn. 289; *Lynde v. Rockland*, 66 Maine, 309; *Brown v. Murdock*, 140 Mass. 314; *Spring v. Hyde Park*, 137 Mass. 554; *Raymond v. Fish*, 51 Conn.

§ 769. *The Doctrine of this Chapter restated.*

A corporation is an artificial being, existing only in contemplation of law. The body of it consists of one or more real persons, and the law-created part is invisible. It has simply the powers and functions which its charter gives it. And as a general rule, to which possibly there are exceptions, its attributes are simply those of an unincorporate man; yet not the whole of them, but such only as are required for the particular purpose. It does not die with the incorporators, but their places are supplied by others. Municipal corporations, and *quasi* municipal, together with some which are constituted for benevolent purposes, have peculiarities growing out of their special natures. A municipal corporation is, among other things, a governing body, yet inferior to and controlled by the State. Out of its governmental powers and some incidentals connected with them, and out of those of *quasi* municipal corporations, have arisen a few nice juridical questions, a repetition of the discussions whereof is not necessary here. They invite the special scrutiny of students, practising lawyers, and the courts. And no ground appears why harmony may not result from fresh investigations guided, not by inconsiderate words of judges printed in the reports of their decisions, but by the reasonings of the law, if it is remembered that the law is a system of reason, which overrules and silences particular discords. The liabilities need not be here repeated. They vary with the objects and powers of the corporation.

80. **Gas Company.** — Russell v. Columbia, 74 Mo. 480. **House of Refuge** — for reformation of convicts, &c. Perry v. House of Refuge, 63 Md. 20. **City Hospital.** — Benton v. Boston City Hosp. 140 Mass. 13. **Cemetery.** — Toledo v. Cone, 41 Ohio State, 149. **New York and Brooklyn Bridge,** — trustees of. Walsh v. New York, &c. Bridge, 96 N. Y. 427. **Trustees of Public Road and the Like.** — Harris v. Baker, 4 M. & S. 27; Holliday v. St. Leonard, 11 C. B. N. s. 192, 8 Jur. N. s. 79; Sutton v. Clarke, 6 Taunt. 29. **Trinity House.** — Gilbert v. Trinity House, 17 Q. B. D. 795.

CHAPTER XXXVI.

OFFICIAL PERSONS.

§ 770. Introduction.

771-774. In General.

775-778. Legislative.

779-784. Judicial.

785-790. *Quasi* Judicial.

791-797. Ministerial.

798. Doctrine of Chapter restated.

§ 770. **How Chapter divided.** — We shall consider this subject as to, I. In General; II. The Legislative Functions; III. The Judicial Functions; IV. *Quasi* Judicial; V. The Ministerial Functions.

I. *In General.*

§ 771. **Protected.** — Since no one is to suffer harm from following a command or permission of the law, whatever injury or loss he may bring to others,¹ a public officer, while fully discharging the duties of his office, is exempt from both civil and criminal liability; and persons thereby hardly dealt with, if without redress from those who moved the officer to action,² must bear the evil uncompensated.³ Even —

§ 772. **Reputation.** — The officer's reputation is protected, under the law of slander and libel, from defamatory words, oral or written, published of him in his office.⁴ Yet in a civil

¹ Ante, § 110, 111.² As, for example, ante, § 218 et seq.³ The authorities to this appear throughout the chapter. The reader can consult such cases as *Burton v. Fulton*, 13 Wright, Pa. 151; *Fenwicke**v. Gibbs*, 2 Des. 629; *Stewart v. Southard*, 17 Ohio, 402; *McConnell v. Dewey*, 5 Neb. 385; *Smith v. Stephan*, 66 Md. 381; *Kemp v. Neville*, 10 C. B. N. s. 523, 7 Jur. N. s. 913.⁴ Ante, § 270, 271, 278; *Banner*

action a plea of their truth is good in defence.¹ And, in broader terms,—

§ 773. **Outside of Duties.**—If an officer steps outside of his official duties,²—as, assumes a jurisdiction where the law gives him none,³ or acts negligently where carefulness is incumbent on him,⁴ or proceeds contrary to the command of the statute which invests him with the authority,⁵ or does to another person any wrong not a necessary part of his official functions,—the mantle of office is not to him a coat of mail, and he must answer for his evil conduct, not always in a civil suit, but, to the party or the public or both, in such form as the law has provided. For,—

§ 774. **Responsibility in Office.**—Though in England it is a maxim that the incumbent of the throne can do no wrong,⁶ while yet his advisers may, we have no throne and no officers superior to the laws. All must answer for their misdeeds, yet not all are subject to the ordinary judicial proceedings. More in detail,—

II. *The Legislative Functions.*

§ 775. **Contempts.**—In suitable cases, a legislative body may punish a member for a contempt, technically termed breach of privilege, as elsewhere explained.⁷ Or,—

§ 776. **Expulsion.**—In circumstances justifying, it may expel a member.⁸ Yet,—

§ 777. **Not answerable to Courts.**—Because legislative functions are discretionary,⁹ and especially because the law-making

Pub. Co. v. The State, 16 Lea, 176 ;
Royce v. Maloney, 58 Vt. 437 ;, Proctor
v. Webster, 16 Q. B. D. 112.

¹ Davis v. Lyon, 91 N. C. 444.

² Ante, § 116 ; Hicks v. Dorn, 42
N. Y. 47.

³ Marshalsea Case, 10 Co. 68 b ;
Griffith v. Frazier, 8 Cranch, 9 ; Wickes
v. Caulk, 5 Har. & J. 36, 42 ; Collamer
v. Page, 35 Vt. 387 ; Watson v. Avery,
2 Bush, 332 ; The State v. Dike, 20
Minn. 363.

⁴ Ante, § 115.

⁵ Marshall v. Yoos, 20 Bradw. 608 ;
Brown v. Murdock, 140 Mass. 314.

⁶ 1 Bl. Com. 246 ; 4 Ib. 33.

⁷ 2 Bishop Crim. Law, § 247, 249,
note ; Anderson v. Dunn, 6 Wheat.
204 ; Burdett v. Abbott, 14 East, 1 ;
Thompson's Case, 8 Howell St. Tr.
1 ; Beaumont v. Barrett, 1 Moore P. C.
59.

⁸ Story Const. § 837, 838 ; Cooley
Const. Lim. 133 ; Hiss v. Bartlett, 3
Gray, 468.

⁹ Ante, § 744-748.

body should be independent of those who are to expound and enforce its enactments, no member of such body can be called to account by the judiciary for acts done in or in connection with the exercise of his legislative powers.¹ Not even will a court, inquiring into the validity and effect of a statute, admit evidence, or suffer imputations, of ill conduct or evil motives in the makers.²

§ 778. **Impeachment** — of a legislator is a cumbersome remedy to which there can be seldom any occasion to resort. Yet it is believed to be permissible on common-law principles, but not under all our constitutions.³

III. *The Judicial Functions.*

§ 779. **General.** — A judge is no less answerable to the law than the humblest person who appears before him to ask or submit to justice. But, as to what he does judicially, he is not to be called to account by his associates; the remedy against him is —

§ 780. **Impeachment.** — Under the constitution of Massachusetts, “the governor, with consent of the council, may remove” any judicial officer “upon the address of both houses of the legislature.”⁴ At the same time, such an officer appears to be liable, like others, to impeachment.⁵ This power of removal by address is said to exist also in some of the other States.⁶ And in all, whether it exists or not, it is believed that the judges of the higher courts and courts of record may be impeached for official misdemeanors.⁷ It is the same with

¹ 1 Bishop Crim. Law, § 461, 462; Stockdale v. Hansard, 9 A. & E. 1, 110, 113, 114.

² Bishop Written Laws, § 38; Ex parte McCordle, 7 Wal. 506, 514; Wright v. Defrees, 8 Ind. 298, 302; People v. Draper, 15 N. Y. 532, 545, 555; Sunbury, &c. Rld. v. Cooper, 9 Casey, Pa. 278.

³ 1 Bishop Crim. Law, § 461; People v. Draper, 15 N. Y. 532, 555; Seymour's Case, 8 Howell St. Tr. 127.

⁴ Const. Mass. pt. 2, c. 3, art. 1.

⁵ Ib. pt. 2, § 2, art. 8.

⁶ Field, J. in Randall v. Brigham, 7 Wal. 523, 537, and Bradley v. Fisher, 13 Wal. 335, 350.

⁷ Story Const. § 800, 804. Cooley, Const. Lim. 160, note, states two cases, one in Rhode Island and the other in Ohio, wherein judges were prosecuted by impeachment for holding statutes void as unconstitutional. Both prosecutions failed.

the Federal judges.¹ There are generally other means of getting rid of corrupt police magistrates and justices of the peace. We need not inquire as to them. Leaving behind also questions of criminal liability,—

§ 781. **Civil Liability.**—No judicial person, whether a judge of a superior court, such as an equity tribunal,² or common-law court of record,³ or a mere justice of the peace or other inferior magistrate,⁴ a member of a court-martial,⁵ or a juror who is a part of the court,⁶ is, for any judicial act within his jurisdiction, however erroneous, mistaken, or even corrupt, answerable in a civil suit to a party aggrieved.

§ 782. **Why?**—Various reasons have been given for this doctrine, any one of which would be alone sufficient. One is, that to allow the judges to be prosecuted in the courts would lead to the scandal and subversion of justice.⁷ Another is, that the fear of being sued would impair both the independence of the judge and his capacity to decide correctly,⁸ and even vacate the judicial seat.⁹ Another is that, in the words of Kent, “judicial exercise of power is imposed upon the courts. They *must* decide and act according to their judg-

¹ See, for example, *Peck's Trial*, by Stansbury, Boston, 1833.

² *Yates v. Lansing*, 5 Johns. 282, 9 Johns. 395.

³ *Randall v. Brigham*, 7 Wal. 523; *Bradley v. Fisher*, 13 Wal. 335, and cases cited in the next note.

⁴ 1 Bishop *Crim. Law*, § 462, 464; *Ward v. Freeman*, 2 Ir. Com. Law, 460; *Fray v. Blackburn*, 3 Best. & S. 576; *Cooke v. Bangs*, 31 Fed. Rep. 640; *Bell v. McKinney*, 63 Missis. 187; *Heard v. Harris*, 68 Ala. 43; *Bocock v. Cochran*, 32 Hun. 521; *Johnston v. Moorman*, 80 Va. 131; *McCall v. Cohen*, 16 S. C. 445, 449; *Hamond v. Howell*, 2 Mod. 218; *Grenville v. College of Physicians*, 12 Mod. 386; *Brodie v. Rutledge*, 2 Bay. 69; *Ambler v. Church*, 1 Root, 211; *Young v. Herbert*, 2 Nott & McC. 172, note; *Tompkins v. Sands*, 8 Wend. 462; *Morrison v. McDonald*, 21 Maine, 550; *Ely v. Thompson*, 3 A. K. Mar. 70; *Little v. Moore*, 1

Southard, 74; *Evans v. Foster*, 1 N. H. 374; *Burnham v. Stevens*, 33 N. H. 247; *Hamilton v. Williams*, 26 Ala. 527; *Bailey v. Wiggins*, 5 Harring. Del. 462; *Pratt v. Gardner*, 2 Cush. 63; *Chickering v. Robinson*, 3 Cush. 543; *Stone v. Graves*, 8 Misso. 148; *Holroyd v. Breare*, 2 B. & Ald. 473; *Fawcett v. Fowlis*, 7 B. & C. 394; *Kemp v. Neville*, 10 C. B. n. s. 523, 7 Jur. n. s. 913.

⁵ *Vanderheyden v. Young*, 11 Johns. 150, 160.

⁶ 1 Bishop *Crim. Law*, § 462; *Turpen v. Booth*, 56 Cal. 65; *Hunter v. Mathis*, 40 Ind. 356.

⁷ *Floyd v. Barker*, 12 Co. 23, 25; *Yates v. Lansing*, 5 Johns. 282, 298.

⁸ *Cooke v. Bangs*, 31 Fed. Rep. 640; *Taafe v. Downes*, 3 Moore P. C. 36; note; *Bradley v. Fisher*, 13 Wal. 335, 347.

⁹ *Phelps v. Sill*, 1 Day, 315.

ment, and, therefore, the law will protect them.”¹ And to render the protection practically effectual, it must extend, beyond mere mistake, to the charge of corruption.² A somewhat different form of reasoning, leading to the same result, is that, when the law commits judicial work to the judges, it commands them to follow therein their own understandings, and it cannot complain of them should they arrive at a conclusion different from its own, in other words, should they, while endeavoring to act rightly, err. In which view, they would not be liable unless their conduct was corrupt. And for corruption in a suit to one’s oppression, the law’s remedy is an action for malicious prosecution, it has no other. But an action of this sort would not lie against a judge; because, as we saw in the chapter treating of it,³ the right of action arises only on an *acquittal*, — a termination for which the party could not complain of the judge. His complaint would be that judgment was rendered against him; and, for this, the malicious prosecution suit can never be maintained; an *acquittal* bars it. There is a nice question as to —

§ 783. *Jurisdiction*. — Theoretically, a court acting outside of its jurisdiction is no court. Theoretically, too, and in some circumstances practically, a want of jurisdiction cannot be waived, and it may be taken advantage of at any time during the progress of a cause or after its termination.⁴ The judgment is a nullity.⁵ But not everything which it is common to speak of as a want of jurisdiction is within these rules.⁶ If, for example, the court has authority to decide the particu-

¹ *Yates v. Lansing*, supra, at p. 297. And see, at large, the lucid opinions of Field, J. in *Bradley v. Fisher*, 13 Wal. 335, and *Randall v. Brigham*, 7 Wal. 523.

² *Floyd v. Barker*, and other cases, supra.

³ Ante, § 218–250.

⁴ *Glidden v. Elkins*, 2 Tyler, 218; *Donaldson v. Hazen*, Hemp. 423; *Osgood v. Thurston*, 23 Pick. 110; *Bent v. Graves*, 3 McCord, 280; *McHenry v. Wallen*, 2 Yerg. 441; *Andrews v. Wheaton*, 23 Conn. 112.

⁵ *Boynton v. Foster*, 7 Met. 415; *Attorney-General v. Hotham*, 1 Turn. & R. 209, 219, 3 Russ. 415; *Westerwelt v. Lewis*, 2 McLean, 511; *Bryan v. Blythe*, 4 Blackf. 249; *Smith v. Knowlton*, 11 N. H. 191; *Barrett v. Crane*, 16 Vt. 246; *Jones v. Jones*, 3 Dev. 360; *Wilson v. Arnold*, 5 Mich. 98.

⁶ *Schenley v. Commonwealth*, 12 Casey, Pa. 29; *Brady v. Richardson*, 18 Ind. 1; *Overstreet v. Brown*, 4 McCord, 79; *Wanzer v. Howland*, 10 Wis. 8.

lar sort of case where the defendant dwells within certain local limits, then, if one not within those limits answers to a suit, the jurisdiction, which was wanting before, is created, the objection being effectually waived.¹ Now, if a judge or magistrate does a wrongful thing outside of his jurisdiction, in a case wherein his judgment is a nullity, it is common in the books to say, and in some circumstances it is true, that the judicial office does not protect him against the suit of the party injured.² But to hold this universally would take from the judge his protection in many cases fully within the principles on which it rests. The question of jurisdiction is a fundamental one in every suit, it is as completely judicial as any other, and the judge must decide it whether it arises on the pleadings or not.³ Then if, proceeding carefully and honestly, he concludes mistakenly in favor of his jurisdiction, doing exactly what the law commands him to do, yet being afterward overruled by other judges, he is just as much within the reasons which protect the judicial office as when he decides any other question erroneously. Whereupon, as to the judges of the higher courts and courts of record, the Supreme Court of the United States has distinguished between acts in excess of their jurisdiction, and those in the clear absence of any jurisdiction over the subject-matter; holding the ordinary rule of exemption applicable to the former, but not to the latter.⁴ Most of the cases exhibit an inclination to be specially severe on justices of the peace and other inferior magistrates; compelling them, in distinction from the rule as to the superior judges, to respond in damages whenever their judicial act was without jurisdiction.⁵ But, in reason, if judges properly expected to be the most learned can plead official exemption for

¹ *Brown v. Webber*, 6 Cush. 560; *Kent*, C. J. in *Yates v. Lausing*, 5 Mahaney v. Penman, 4 Duer, 603; *Johns*. 282, 290, referring to *Marshalsea Case*, 10 Co. 68 b; *Field*, J. in *Randall v. Brigham*, 7 Wal. 523, 535, 536, repeated in *Bradley v. Fisher*, supra, at p. 351; *Vaughn v. Congdon*, 56 Vt. 111; *Nichols v. Walker*, Cro. Car. 394; *Piper v. Pearson*, 2 Gray, 120; *Willis v. MacLachlan*, 1 Ex. D. 376.

² *Houlden v. Smith*, 14 Q. B. 841.

³ *Stamps v. Newton*, 3 How. Missis. 34; *The State v. Scott*, 1 Bailey, 294.

⁴ *Bradley v. Fisher*, 13 Wal. 335.

⁵ *Wingate v. Waite*, 6 M. & W. 739; *Estopinal v. Peyroux*, 37 La. An. 477;

their blunderings in the law, *a fortiori* those from whom less is to be expected and who receive less pay should not be compelled to respond in damages to their mistakes honestly made after due carefulness. And it was held in New Jersey that an inferior magistrate is not so answerable where the matter is colorably though not really within his jurisdiction.¹ Moreover, in other respects, the better authorities appear greatly to limit the strict rule.² Plainly, in reason, if a judicial officer of whatever grade should take jurisdiction where he knew he had none, or without due care to ascertain the law, he should answer in damages to the party injured; and so, it is believed, are the authorities. And in legal reason also, this should constitute the only exception to the general rule of exemption, as to which the grade of the judicial office should be deemed immaterial.

§ 784. **Ministerial.** — Judges have more or less ministerial duties; and, for the wrongful exercise of them, they are responsible to the persons injured in the same manner and to the same extent as other civil officers.³

IV. *Quasi Judicial.*

§ 785. **What.** — *Quasi* judicial functions are those which lie midway between the judicial and ministerial ones. The lines separating them from such as are thus on their two sides are necessarily indistinct; but, in general terms, —

§ 786. **Doctrine defined.** — When the law, in words or by implication, commits to any officer the duty of looking into facts, and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed *quasi* judicial; and he is responsible to one

¹ *Grove v. Van Duyn*, 15 Vroom, 654, and see the expositions of Beasley, C. J. p. 658, 659.

² *Bell v. McKinney*, 63 Missis. 187; *Bocock v. Cochran*, 32 Hun, 521; *McCall v. Cohen*, 16 S. C. 445; *Aylesworth v. St. John*, 25 Hun, 156; *Heard v. Harris*, 68 Ala. 43. And see *Lowther v. Radnor*, 8 East, 113.

³ *Briggs v. Wardwell*, 10 Mass. 356; *Tompkins v. Sands*, 8 Wend. 462; *Taylor v. Doremus*, 1 Harrison, 473; *Stone v. Graves*, 8 Misso. 148; *Spears v. Smith*, 9 Lea, 483; *McTeer v. Lebow*, 85 Tenn. 121; *Pike v. Megoun*, 44 Mo. 491.

injured by his wrongful doing only if it is negligent, or malicious, or both.¹ His situation is analogous to that of the judge or magistrate, explained in the last sub-title, but not identical; yet substantially the same as that of the municipal corporation, which, like the officer, is a governmental instrumentality.²

§ 787. **Why?** — The reasons for this exemption differ somewhat from those which give immunity to the judge of a court,³ as does the extent of the exemption itself. It has indeed been placed, and justly, on the ground of public policy;⁴ but public policy does not seem specially to require it in all cases in which it prevails. And a reason covering the entire ground, applicable in all cases within the doctrine, is that, by the express or implied terms of the officer's authority, he is to act honestly, carefully, and after the dictates of his own judgment, which, of necessity, being a human judgment, may err; therefore, when he has done what is thus commanded, whether the result is correct or not, he has exactly discharged his duty, and the law, which compelled this of him, will protect him, whatever harm may have befallen individuals.⁵

§ 788. **In what Cases.** — This doctrine protects an assessor of taxes in making a valuation or otherwise determining a liability,⁶ but not where his act is outside of his jurisdiction;⁷ a school board, in expelling a scholar;⁸ a town board of equalization, in determining the value of land;⁹ commissioners for

¹ *Porter v. Haight*, 45 Cal. 631; *Downer v. Lent*, 6 Cal. 94; *Rail v. Potts*, 8 Humph. 225; *Seaman v. Pat-ten*, 2 Caines, 312; *Harman v. Brother-son*, 1 Denio, 537; *Easton v. Calendar*, 11 Wend. 90; *Harman v. Tappenden*, 1 East, 555; *Boner v. Adams*, 65 N. C. 639; *Walker v. Hallock*, 32 Ind. 239; *Schoettgen v. Wilson*, 48 Mo. 253; *Edwards v. Ferguson*, 73 Mo. 686. In *Kendall v. Stokes*, 3 How. U. S. 87, 98, Taney, C. J. stated the doctrine thus: "A public officer is not liable to an action if he falls into error, in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judg-

ment and discretion; even although an individual may suffer by his mistake."

² Ante, § 746-750.

³ Ante, § 782.

⁴ *Gidley v. Palmerston*, 7 Moore, 91, 110; *Dillingham v. Snow*, 5 Mass. 547, 558. And see *Williams v. Adams*, 3 Allen, 171.

⁵ Ante, § 110-130.

⁶ *Dillingham v. Snow*, 5 Mass. 547, 559; *Weaver v. Devendorf*, 3 Denio, 117. See *Morgan v. Graham*, 1 Woods, 124.

⁷ *Dorn v. Backer*, 61 N. Y. 261.

⁸ *Stewart v. Southard*, 17 Ohio, 402.

⁹ *Steele v. Dunham*, 26 Wis. 393.

straightening a river to prevent inundations, in the manner of their work;¹ arbitrators, in their doings as such,² and multitudes of other official persons within the same reasons. Still,—

§ 789. **Corrupt — Negligent.** — From the ground on which this doctrine rests,³ it follows that, if the *quasi*-judicial act is corrupt, or even if it is negligent,⁴ it will not be protected. So also, in general, are understood to be the judicial utterances and adjudications.⁵ And,—

§ 790. **Jurisdiction.** — In a general way, the *quasi*-judicial functions, like the judicial,⁶ will be protected only as to what is done with jurisdiction. As to this matter, the two classes of functions appear, in reason, to occupy like ground; the rule as to both requiring the limitations already explained.⁷

V. *The Ministerial Functions.*

§ 791. **When never Liable.** — The rule already stated,⁸ that an officer is protected from liability for an injury inflicted in the doing of anything which a valid law requires, is emphatically applicable to the ministerial functions. Though an individual may be injured, the officer is not responsible to him. And this rule is universal. To illustrate,—

§ 792. **Process of Court.** — If a court issues to its proper officer its command in due form,—as, to arrest a person, to attach his goods, or the like,—if the court has jurisdiction of the case, and if the process is otherwise valid on its face, the officer is justified in executing it, however improvidently it was issued, or even though founded on a void judgment.⁹

¹ *Green v. Swift*, 47 Cal. 536.

² *Jones v. Brown*, 54 Iowa, 74.

³ *Ante*, § 787.

⁴ *Ante*, § 115.

⁵ *Harman v. Tappenden*, 1 East, 555; *Pike v. Megoun*, 44 Mo. 491; *Walker v. Hallock*, 32 Ind. 239; *Lilienthal v. Campbell*, 22 La. An. 600; *Gregory v. Brooks*, 37 Conn. 365; *Gould v. Hammond*, McAl. 235; *Bennett v. Fulmer*, 13 Wright, Pa. 155,

and multitudes of other cases, a part of which have already been cited under this sub-title.

⁶ *Ante*, § 783.

⁷ This appears in the foregoing cases at large.

⁸ *Ante*, § 771.

⁹ *Ante*, § 211; 1 *Bishop Crim. Proced.* § 187; *Norcross v. Nunan*, 61 Cal. 640; *Andrews v. Marris*, 1 Q. B. 3, 16; *Watson v. Watson*, 9 Conn. 140;

Here he has inflicted damage on a party, yet he is not responsible therefor. On the other hand, —

§ 793. **Outside of Duty.** — A ministerial officer is not protected, as a judicial or *quasi*-judicial may be, from liability for an injurious act not within the line of his duties, however free from intentional wrong or malice.¹ Thus, —

§ 794. **Taking Wrong Property.** — If an officer, having an execution against one person, levies upon the property of another, he is responsible to him, on whatever good reason he may have supposed it to belong to the former.² And the same rule applies where the officer takes in execution the defendant's exempt effects.³ Or, —

§ 795. **Arresting Wrong Person.** — If an officer, having a writ for the arrest of one person, takes another instead, however mistakenly, he is liable to the latter.⁴ But, on the principle which justifies an officer in obeying his precept whatever irregularities lie behind,⁵ if, there being two persons of the same name, a summons is served on the one not indebted, and judgment is rendered against him on default for the other's debt, an officer knowing the facts is legally justified in taking the former on execution.⁶ Again, —

§ 796. **Neglects.** — When circumstances have transpired which create a duty in a ministerial officer toward an individual, the latter has his action against the former, to be compensated for his losses through its non-discharge.⁷ It is so,

Rothe v. Duvall, 1 Idaho, 149; Cody v. Quinn, 6 Ire. 191; Noble v. Holmes, 5 Hill, N. Y. 194; Cornell v. Barnes, 7 Hill, N. Y. 35; Rex v. Danser, 6 T. R. 242, 245; Cogburn v. Spence, 15 Ala. 549; People v. Warren, 5 Hill, N. Y. 440; Brainard v. Head, 15 La. An. 489; Hart v. Dubois, 20 Wend. 236; Brother v. Cannon, 1 Scam. 200.

¹ Keith v. Howard, 24 Pick. 292; Williams v. Powell, 101 Mass. 467; Lyon v. Goree, 15 Ala. 360.

² Glasspoole v. Young, 9 B. & C. 696, 700, 701; Walcot v. Pomeroy, 2 Pick. 121; Hallowell, &c. Bank v. Howard, 14 Mass. 181; Saunderson

v. Baker, 3 Wils. 309; Edwards v. Bridges, 2 Stark. 396; Kingsbury v. Pond, 3 N. H. 511; Weber v. Henry, 16 Mich. 399.

³ McGuire v. Galligan, 57 Mich. 38; Bonnel v. Dunn, 4 Dutcher, 153; Frost v. Mott, 34 N. Y. 253.

⁴ Ante, § 213; Hays v. Creary, 60 Texas, 445; Johnston v. Riley, 13 Ga. 97.

⁵ Ante, § 792.

⁶ O'Shaughnessy v. Baxter, 121 Mass. 515.

⁷ St. Joseph Fire, &c. Ins. Co. v. Leland, 90 Mo. 177; Harrington v. Wadsworth, 63 N. H. 400.

for example, where the proper officer neglects to execute a process of the court committed to him, to the injury of a party.¹ Even if he is too sick to do the service in person, he should turn over the work to another officer, or he will be liable.²

§ 797. **Other Duties and Liabilities.** — The subject of this sub-title might be greatly expanded, leading us into extensive elucidations of the duties and liabilities of particular ministerial officers. But so we should travel beyond the lines which bound the sphere of this volume. The principles are already in this chapter sufficiently developed, with enough of illustrations to render their several natures and applications plain. Therefore the chapter should here close.

§ 798. *The Doctrine of this Chapter restated.*

The rights and liabilities of official persons vary with the differing official functions and the diverse natures of their several offices. One invested with official power is not, therefore, licensed to become a law-breaker. But if a function is by the law made in him discretionary, he is not to be called to account for exercising therein an honest discretion however mistaken; though ordinarily he is liable to one injured if he discharges even this duty corruptly. Yet a discretion in a legislator or the judge of a court is not to be reviewed, at the suit of a complaining party, by the judiciary. The remedy is with the legislative body, to be exercised by expulsion or by impeachment, as the particular case requires. A duty not discretionary, imposed by the law upon an officer, affords no room for this sort of doctrine. He is exempt from liability if he discharges it according to its terms. But if he neglects it, and thereby injures one who has acquired an interest in its doing, he is answerable to this person. If, while merely professing or even honestly intending to discharge it, he in fact steps aside and injures another, he must make to him compensation.

¹ *Mason v. Paynter*, 1 Q. B. 974; ² *Freudenstein v. McNier*, 81 Ill. Adams v. Spangler, 17 Fed. Rep. 133; 208.
Demint v. Thompson, 80 Ky. 255. .

BOOK V.

RIGHTS AND LIABILITIES PERTAINING TO PARTICULAR PLACES AND THINGS.

CHAPTER XXXVII.

LANDS, BUILDINGS THEREON, AND FENCES.

§ 799. Introduction.

800-812. Uses and Manner of Fencing.

813-818. Buildings and how they Protect.

819-825. One's Use and Abuse of Another's Realty.

826-859. One's Use and Misuse of Own Realty.

860. Doctrine of Chapter restated.

§ 799. **How Chapter divided.** — Reversing the order in the title, we shall consider, I. The Uses and Manner of Fencing; II. Buildings and their Protection in Law to Persons and Things therein; III. One's Use and Abuse of Another's Realty; IV. One's Use and Misuse of his Own Realty.

I. *The Uses and Manner of Fencing.*

§ 800. **Purpose of Fence.** — Fences are not built to protect the property against trespasses by men, by birds, or by dogs. They are simply for its preservation from damage by cattle and other like domestic animals.¹ If practically they some-

¹ The statutes differ in their terms. We have the words "cattle, horses, sheep, and hogs." Ohio, &c. Rld. v. Brubaker, 47 Ill. 462. Also, among other things, "hogs," Staub v. Fantz, 11 Heisk. 766; and, though horses and horned cattle are more particularly intended by most of our fence laws, some

times serve other purposes also, such benefits are not within any special contemplation of the law. Now,—

§ 801. **At Common Law**,—the owner of cattle is required to take care of them. If they trespass on a neighbor's land, he is responsible though there is no fence.¹ Such, in the absence of a statute, is the rule of law in most of our States.² But in a few of them it is not accepted, so that owners are not responsible for the trespasses of their cattle running at large.³ And pretty generally with us there are statutes requiring fences, thus taking the place of the common law.⁴ So,—

§ 802. **Prescription — Agreement**.—In England where, contrary to the ordinary course of things in our young country, prescriptive rights are common, the duty to fence is often cast upon a party by prescription.⁵ With us, the thing which prescription presumes—namely, an agreement between the parties interested⁶—is sometimes entered into;⁷ sometimes, here also, there is prescription.⁸

are specially meant for protection against hogs. *Wells v. Beal*, 9 Kan. 597. See also *Willard v. Mathesus*, 7 Colo. 76; *Schrier v. Milwaukee, &c. Ry.* 65 Wis. 457; *Keyser v. Chicago, &c. Ry.* 56 Mich. 559; *Walkenhauer v. Chicago, &c. Ry.* 3 McCrary, 553.

¹ 3 Bl. Com. 211; 3 Kent Com. 438; Com. Dig. Trespass, D; *Churchill v. Evans*, 1 Taunt. 529; *Ellis v. Loftus Iron Co. Law Rep.* 10 C. P. 10.

² *Wells v. Beal*, 9 Kan. 597; *Baker v. Robbins*, 9 Kan. 303; *Brady v. Ball*, 14 Ind. 317; *McBride v. Lynd*, 55 Ill. 411; *French v. Cresswell*, 13 Oregon, 418; *Wells v. Howell*, 19 Johns. 385; *Bush v. Brainard*, 1 Cow. 78; *Milligan v. Wehinger*, 18 Smith, Pa. 235; *Keenan v. Cavanaugh*, 44 Vt. 268; *Little v. Lathrop*, 5 Greenl. 356; *Lord v. Wormwood*, 29 Maine, 282; *Lyons v. Merrick*, 105 Mass. 71, 75; *Michigan So. &c. Rld. v. Fisher*, 27 Ind. 96; *Page v. Hollingsworth*, 7 Ind. 317.

⁸ *Adams v. Van Alstyne*, 25 N. Y. 232; *Binney v. Proprietors in Hull*, 5 Pick. 503; *Thayer v. Arnold*, 4 Met.

³ *McPheeters v. Hannibal, &c. Rld.* 45 Mo. 22; *Morris v. Fraker*, 5 Colo. 425; *Raiford v. Mississippi, &c. Rld.* 43 Missis. 233; *Frazier v. Nortinus*, 34 Iowa, 82; *Cleveland, &c. Rld. v. Elliott*, 4 Ohio State, 474.

⁴ *Campbell v. Bridwell*, 5 Oregon, 311; *Staub v. Fantz*, 11 Heisk. 766; *Logan v. Gedney*, 38 Cal. 579; *Blizard v. Walker*, 32 Ind. 437; *Camp v. Flaherty*, 28 Iowa, 520; *Illinois Cent. Rld. v. Arnold*, 47 Ill. 173; *Oil v. Rowley*, 69 Ill. 469.

⁵ *Star v. Rookesby*, 1 Salk. 335; *Anonymous*, 1 Vent. 264, 3 Salk. 278; *Carruthers v. Hollis*, 8 A. & E. 113.

⁶ *Boyle v. Tamlyn*, 6 B. & C. 329, 338; *Gilchrist v. Gilchrist*, 76 Ill. 281.

⁷ *Pittsburg, &c. Ry. v. Smith*, 26 Ohio State, 124; *Page v. Hodgdon*, 63 N. H. 53; *Gill v. Atlantic, &c. Ry.* 27 Ohio State, 240; *Cincinnati, &c. Rld. v. Ridge*, 54 Ind. 39; *Vandorn v. New Jersey So. Rld.* 15 Stew. Ch. 463; *Stone*

589; *Rust v. Low*, 6 Mass. 90; *Heath v. Ricker*, 2 Greenl. 72.

§ 803. **The Formalities** — for establishing and keeping in repair a division fence vary with the statutes. Pertaining merely to conflicting local law, they will not be explained here.

§ 804. **Sufficiency of Fence.** — The statute or custom determines what shall be an adequate — sometimes termed “lawful” — fence, but there is no uniform standard for the States; so, for this, the practitioner must resort to his local authorities.¹

§ 805. **Injuring Fence.** — One who unlawfully injures a fence must pay the resulting damage. Thus, if a railroad negligently burns a fence, thereby causing a loss of crops to a third person not himself in fault, it must compensate this person.² And one’s breaking of another’s fence brings to him the same consequence.³ Of course, in these cases the fence-owner is entitled also to be indemnified.⁴ In like manner, —

§ 806. **Neglect to Repair.** — A person whose duty it is to repair a fence is liable for whatever damage results from its neglect.⁵ It is so, for example, if another’s horse in an adjoining field is injured;⁶ or, escaping into the delinquent person’s field, is there killed by a falling haystack.⁷ But —

§ 807. **Sufferer’s own Neglect.** — One cannot complain of what he has brought upon himself; as if, through a fence in-

v. Wait, 50 Vt. 663; *Ivins v. Ackerson*, 9 Vroom, 220; *Bills v. Belknap*, 38 Iowa, 225; *Dent v. Ross*, 52 Missis. 188; *Pitman v. Gale*, 63 N. H. 75. Of course, it may be equally well by actual agreement in England, and sometimes it is. *Boyle v. Tamlyn*, 6 B. & C. 329.

¹ *Meade v. Watson*, 67 Cal. 591; *Hilliard v. Chicago, &c. Ry.* 37 Iowa, 442; *Phillips v. Oystee*, 32 Iowa, 257; *Moore v. White*, 45 Mo. 206; *Scott v. Wirshing*, 64 Ill. 102; *Montgomery v. Handy*, 62 Missis. 16; *Shellabarger v. Chicago, &c. Ry.* 66 Iowa, 18; *Clark v. Stipp*, 75 Ind. 114; *McIlvaine v. Lantz*, 4 Out. Pa. 586; *Storms v. White*, 23 Mo. Ap. 31; *Hinshaw v.*

Gilpin, 64 Ind. 116; *Polk v. Lane*, 4 Yerg. 36.

² *Miller v. St. Louis, &c. Ry.* 90 Mo. 389.

³ *Courtney v. Collet*, 1 Ld. Raym. 272; *Russell v. Hanley*, 20 Iowa, 219.

⁴ And see *Avary v. Searcy*, 50 Ala. 54; *Howard v. Black*, 42 Vt. 258; *Drees v. The State*, 37 Ark. 122; *Matson v. Calhoun*, 44 Mo. 368; *Polk v. Lane*, 4 Yerg. 36.

⁵ *Cheetham v. Hampson*, 4 T. R. 318.

⁶ *Rooth v. Wilson*, 1 B. & Ald. 59. And see *Herrick v. Gary*, 65 Ill. 101.

⁷ *Powell v. Salisbury*, 2 Y. & J. 391.

sufficient because of his own non-repair contrary to a duty, his neighbor's cattle come upon his land and do damage, he can have no action against the neighbor.¹ His own negligence being thus the proximate cause of his loss, he must bear it uncompensated.² Yet if, in these circumstances, the neighbor drives the cattle upon his land, the injury comes from a disconnected wrong of the neighbor's,³ and he may have his action for the damage.⁴

§ 808. **Breaking through Lawful Fence.** — The owner of cattle that break through a lawful fence⁵ and do damage, must make compensation.⁶

§ 809. *Specially as to Railroads:* —

At Common Law. — From the foregoing it follows that, in the absence of a statutory command, railroads are under no duty to fence their right of way; and that, if they do not, cattle are no more permitted to trespass upon it than persons.⁷ Still, —

§ 810. **Legislation.** — It is competent for the State to establish legislative regulations on this subject, compelling the railroads to fence their tracks.⁸ This in most of the States has been done; but the statutes are various in their provisions, so they will not be given here in detail.

§ 811. **Liability to Owners of Cattle.** — These statutes, by

¹ Com. Dig. Trespass, D; Wills v. Walters, 5 Bush, 351; Little v. McGuire, 38 Iowa, 560; Duffes v. Judd, 48 Iowa, 256; Akers v. George, 61 Ill. 376; Scott v. Grover, 56 Vt. 499.

² Ante, § 462.

³ Ante, § 61.

⁴ Powers v. Kindt, 13 Kan. 74. And see Erbes v. Wehmeyer, 69 Iowa, 85; Bullard v. Mulligan, 69 Iowa, 416; Carruthers v. Hollis, 8 A. & E. 113; Fitzer v. Shinnick, 41 Wis. 676.

⁵ Ante, § 804.

⁶ Rice v. Nagle, 14 Kan. 498; Angus v. Radin, 2 Southard, 815.

⁷ Jones v. Western N. C. Rld. 95 N. C. 328; Williams v. Northern Pac. Rld. 3 Dak. 168; Indianapolis, &c. Rld. v. Harter, 38 Ind. 557; Camp-

bell v. New York, &c. Rld. 50 Conn. 128. There are States as to the law of which this statement would not be correct. Thus, in Florida, neither is a railroad required to fence nor the owner of cattle to keep them off its track. Savannah, &c. Ry. v. Geiger, 21 Fla. 669. And see New Orleans, &c. Rld. v. Field, 46 Missis. 573.

⁸ Missouri Pac. Ry. v. Humes, 115 U. S. 512; Pennsylvania Rld. v. Riblet, 16 Smith, Pa. 164; Texas Central Ry. v. Childress, 64 Texas, 346; Phillips v. Missouri Pac. Ry. 86 Mo. 540; Hines v. Missouri Pac. Ry. 86 Mo. 629; Humes v. Missouri Pac. Ry. 82 Mo. 221; Meyers v. Union Trust Co. 82 Mo. 237.

their constructive effect or their direct terms, create a wide liability of the roads to the owners of cattle killed through their neglect to build or keep in repair fences.¹

§ 812. **Rebuilding — Repairing.** — A fence destroyed by fire must be promptly rebuilt;² if it is, the accidental burning does not constitute a breach of the road's duty to fence.³ And the like doctrine applies to its getting out of repair by other means.⁴ But the road must use diligence to keep up repairs⁵ and to make them properly.⁶

¹ Toledo, &c. Ry. v. Logan, 71 Ill. 191; Devine v. St. Paul, &c. Rld. 22 Minn. 8; Winger v. First Division, &c. Rld. 22 Minn. 11; Hovorka v. Minneapolis, &c. Ry. 34 Minn. 281; Emmons v. Minneapolis, &c. Ry. 35 Minn. 503; Witthouse v. Atlantic, &c. Rld. 64 Mo. 523; Asher v. St. Louis, &c. Ry. 39 Mo. 116; Radcliffe v. St. Louis, &c. Ry. 90 Mo. 127; Tickell v. St. Louis, &c. Ry. 90 Mo. 296; Accola v. Chicago, &c. Ry. 70 Iowa, 185; Liston v. Central Iowa Ry. 70 Iowa, 714; Peoria, &c. Rld. v. Barton, 80 Ill. 72; Indiana, &c. Ry. v. Quick, 109 Ind. 295; Cincinnati, &c. Ry. v. Parker, 109 Ind. 235; Glandon v. Chicago, &c. Ry. 68 Iowa, 457; Pittsburgh, &c. Ry. v. Hackney, 53 Ind. 488; Toledo, &c. Ry. v. Lavery, 71 Ill. 522; Ward v. St. Louis, &c. Ry. 91 Mo. 168; St. Johnsbury, &c. Rld. v. Hunt, 59 Vt. 294; Toledo, &c. Ry. v. Weaver, 34 Ind. 298; Jeffersonville, &c. Rld. v. O'Connor, 37 Ind. 95; Toledo, &c. Ry. v. Cary, 37 Ind. 172; Jeffersonville, &c. Rld. v. Sullivan, 38 Ind. 262; Fritz v. Milwaukee, &c. Rld. 34 Iowa, 337; Pittsburgh, &c. Rld. v. Brown, 44 Ind. 409; Pound v. Port Huron, &c. Ry. 54 Mich. 13; Snider v. St. Louis, &c. Ry. 73 Mo. 465; Razor v. St. Louis, &c. Ry. 73 Mo. 471; Lee v. Minneapolis, &c. Ry. 66 Iowa, 131; Indianapolis,

&c. Rld. v. Lindley, 75 Ind. 426; Chicago, &c. Ry. v. Diehl, 52 Ill. 441; Toledo, &c. Ry. v. Darst, 51 Ill. 365; Walther v. Pacific Rld. 55 Mo. 271; Slattery v. St. Louis, &c. Rld. 55 Mo. 362; Burlington, &c. Rld. v. Shoemaker, 18 Neb. 369; Clarkson v. Wabash, &c. Ry. 84 Mo. 583; Manz v. St. Louis, &c. Ry. 87 Mo. 278; McCoy v. California Pac. Rld. 40 Cal. 532.

² Toledo, &c. Ry. v. Cohen, 44 Ind. 444.

³ Stephenson v. Grand Trunk Ry. 34 Mich. 323; Crosby v. Detroit, &c. Ry. 58 Mich. 458.

⁴ Duncan v. St. Louis, &c. Ry. 91 Mo. 67; Laude v. Chicago, &c. Ry. 33 Wis. 640; Antisdell v. Chicago, &c. Ry. 26 Wis. 145; Chicago, &c. Ry. v. Barrie, 55 Ill. 226; Chicago, &c. Rld. v. Guertin, 115 Ill. 466; Perry v. Dubuque, &c. Ry. 36 Iowa, 102.

⁵ Grand Rapids, &c. Rld. v. Monroe, 47 Mich. 152; Agnew v. Michigan Cent. Rld. 56 Mich. 56; Clardy v. St. Louis, &c. Ry. 73 Mo. 576; Aylesworth v. Chicago, &c. Rld. 30 Iowa, 459; Dewey v. Chicago, &c. Rld. 31 Iowa, 373; Davis v. Hannibal, &c. Ry. 19 Mo. Ap. 425; Maberry v. Missouri Pac. Ry. 83 Mo. 664.

⁶ Baltimore, &c. Rld. v. Schultz, 43 Ohio State, 270. And see Chicago, &c. Rld. v. Umphenour, 69 Ill. 198.

II. *Buildings and their Protection in Law to Persons and Things therein.*

§ 813. **Are Realty.** — Subject to exceptions not important to our present expositions, all structures of a permanent nature, resting upon the soil, are in law parcel of it; being, therefore, real estate, the ownership of which attaches to and passes with that of the soil.¹ Hence, —

§ 814. **Simply Land — (Injuries to).** — For most purposes, a building is simply land. An injury to it is prosecuted as done to the land.² And as, in civil jurisprudence, one who has been harmed is entitled to such damages only as will compensate him for his loss,³ estimated largely in the circumstances which permit them to be exemplary,⁴ there is little room for distinguishing between the soil and the buildings, in contemplating injuries done to the one or the other; the test being, not which one, but the amount. Yet, —

§ 815. **In the Criminal Law,** — where penalties are imposed from public considerations, and not as compensation to individuals who have suffered,⁵ offences committed by breaking and entering buildings and by burning them, and attempts to commit crimes by such means, are made more heavily punishable than are the like things done or attempted upon the open ground. But they are not within our present inquiries. Still, —

¹ Co. Lit. 4a; 2 Bl. Com. 18; 3 Mod. 433; Story v. Odin, 12 Mass. Kent Com. 401; Hemenway v. Cutler, 51 Maine, 407; Washburn v. Sproat, 16 Mass. 449; Penton v. Robart, 2 East, 88; Kingsley v. Holbrook, 45 N. H. 313; Mott v. Palmer, 1 Comst. 564, 569; Wood v. Hewett, 8 Q. B. 913; Martin v. Roe, 7 Ellis & B. 237; Landon v. Platt, 34 Conn. 517; Goff v. O'Conner, 16 Ill. 421; Gibbs v. Estey, 15 Gray, 587; Reid v. Kirk, 12 Rich. 54; Hartwell v. Kelly, 117 Mass. 235; Schoonover v. Irwin, 58 Ind. 287.

² 1 Chit. Pl. 174; Anonymous, 12 Mod. 420; Turton v. Reynolds, 12

Mod. 433; Story v. Odin, 12 Mass. 157; Sawyer v. Ryan, 13 Met. 144, 148.

³ Ante, § 22, 30, 32, 227, 244, 310, 317, 318, 338, 340, 350, 519.

⁴ Philadelphia, &c. Rld. v. Quigley, 21 How. U. S. 202, 213; Milwaukee, &c. Ry. v. Arms, 91 U. S. 489, 492; Smalley v. Smalley, 81 Ill. 70; Devaughn v. Heath, 37 Ala. 595; Dickey v. McDonnell, 41 Ill. 62; Best v. Allen, 30 Ill. 30; New Orleans, &c. Rld. v. Hurst, 36 Missis. 660.

⁵ Ante, § 519.

§ 816. **The Dwelling-house**, — termed anciently the castle, furnishes now as formerly a special protection to the persons and effects therein, in contemplation of our civil jurisprudence. It consists, not necessarily of a single building, but of the cluster of buildings, main and auxiliary, used for habitation; extending even to the barn and stable, if within the curtilage of the inhabited structure.¹ One cannot, by shutting himself up in his dwelling-house, avoid arrest for crime;² but the law in no ordinary circumstances permits a private person to enter it against his will, nor has any officer the right to break and pass through its outer doors to serve civil process.³ And fraud in effecting an entry may be in its effect equivalent to force.⁴ On the other hand, —

§ 817. **Other Buildings** — do not, in civil jurisprudence, furnish any corresponding protection. An officer whose precept permits him to enter upon open lands and arrest a person or attach his goods may, on demand and refusal (a step necessary to avoid needless damage), break any other building and take the person or goods.⁵

§ 818. **As Parts of the Realty**, — buildings will be considered with the rest in the following sub-titles.

III. *One's Use and Abuse of Another's Realty.*

§ 819. **What Abuse Actionable**. — Except as to what is justifiable under the necessity explained in a preceding chapter,⁶

¹ Bishop Stat. Crimes. § 277–290.

² 1 Bishop Crim. Proc. § 195–205; Jacobs v. Measures, 13 Gray, 74.

³ *Ib.* § 195; 1 Bishop Crim. Law, § 858, 859; Curtis v. Hubbard, 4 Hill, N. Y. 437; Pugh v. Griffith, 7 A. & E. 827; Kerbey v. Denby, 1 M. & W. 336; Swain v. Mizner, 8 Gray, 182; Oystead v. Shed, 13 Mass. 520; Ilsley v. Nichols, 12 Pick. 270; Stedman v. Crane, 11 Met. 295; Boggs v. Vandyke, 3 Haring. Del. 288; Ratcliffe v. Burton, 3 B. & P. 223; Calvert v. Stone, 10 B. Monr. 152; People v. Hubbard, 24 Wend. 369. But the dwelling-house does not protect the goods of a third

person. De Graffenreid v. Mitchell, 3 McCord, 506; Burton v. Wilkinson, 18 Vt. 186. Consult ante, § 125.

⁴ Kimball v. Custer, 73 Ill. 389. Compare 1 Bishop Crim. Law, § 262.

⁵ 1 Bishop Crim. Proc. § 194; Burton v. Wilkinson, 18 Vt. 186; Fullerton v. Mack, 2 Aikens, 415; Platt v. Brown, 16 Pick. 553; Perry v. Carr, 42 Vt. 50; Fullam v. Stearns, 30 Vt. 443.

⁶ Ante, § 155–185; Jennings v. Fundeburg, 4 McCord, 161; Burton v. McClellan, 2 Scam. 434; Chidester v. Consolidated Ditch Co. 59 Cal. 197; Bowditch v. Boston, 101 U. S. 16.

whenever one directly or indirectly applies any physical force to another's real estate, — as, where he sets his foot upon it,¹ suffers his domestic animal to go upon it,² casts upon it stones³ or water,⁴ plants a tree upon his own ground and lets it grow and its branches overhang a neighbor's⁵ or its roots run into a neighbor's well,⁶ descends upon it from a balloon,⁷ or does any other act analogous, — he commits a wrong for which the owner may have his civil action, whether the thing was done through mistake⁸ or negligence⁹ or purposely, in malice or friendship¹⁰ or neither, under a claim of right or not,¹¹ or with whatever intent,¹² and whether he inflicts a damage appreciable by a money standard or not,¹³ or even though he enhances the value of the land,¹⁴ unless his doing was by the express or implied consent of the owner, or by authorization of law.¹⁵ Thus, —

¹ *Ellis v. Loftus Iron Co.* Law Rep. 10 C. P. 10; *Glenn v. Kays*, 1 Bradw. 479; *Dougherty v. Stepp*, 1 Dev. & B. 371.

² *Triscony v. Brandenstein*, 66 Cal. 514; *Lee v. Burk*, 15 Bradw. 651; *Noyes v. Colby*, 10 Fost. N. H. 143; *Union Pac. Ry. v. Rollins*, 5 Kan. 167.

³ *Georgetown, &c. Ry. v. Eagles*, 9 Colo. 544.

⁴ *Garraty v. Duffy*, 7 R. I. 476; *Reynolds v. Clarke*, 2 Ld. Raym. 1399; *Torpey v. Independence*, 24 Mo. Ap. 288; *Mangold v. St. Louis, &c. Rld.* 24 Mo. Ap. 52; *Beckley v. Skroh*, 19 Mo. Ap. 75; *Sullivan v. Phillips*, 110 Ind. 320; *Hargreaves v. Kimberly*, 26 W. Va. 787; *Savannah, &c. Ry. v. Lawton*, 75 Ga. 192; *Woodward v. Worcester*, 121 Mass. 245.

⁵ Ante, § 417; *Grandona v. Lovdal*, 70 Cal. 161.

⁶ *Buckingham v. Elliott*, 62 Missis. 296.

— ⁷ *Guille v. Swan*, 19 Johns. 381.

⁸ *Hobart v. Hagget*, 3 Fairf. 67; *Newsom v. Anderson*, 2 Ire. 42; *Beckwith v. Shordike*, 4 Bur. 2092.

⁹ *Denver v. Rhodes*, 9 Colo. 554; *Keirn v. Warfield*, 60 Missis. 799; *Mississippi Cent. Rld. v. Mason*, 51

Missis. 234; *Mississippi Cent. Rld. v. Caruth*, 51 Missis. 77.

¹⁰ *Cannon v. Overstreet*, 2 Baxter, 464.

¹¹ *Osborne v. Warren*, 44 Conn. 357; *Pearson v. Inlow*, 20 Mo. 322; *Rowe v. Bradley*, 12 Cal. 226; *Douglass v. Dickson*, 31 Kan. 310.

¹² *Luttrell v. Hazen*, 3 Sneed, Tenn. 20; *Bohun v. Taylor*, 6 Cow. 313; *Amick v. O'Hara*, 6 Blackf. 258; *Cate v. Cate*, 44 N. H. 211; *Bruch v. Carter*, 3 Vroom, 554; *Dexter v. Cole*, 6 Wis. 319.

¹³ Ante, § 30; *Martinsville v. Shirley*, 84 Ind. 546; *Kansas Pac. Ry. v. Muhlman*, 17 Kan. 224.

¹⁴ *Murphy v. Fond du Lac*, 23 Wis. 365; *Pfeiffer v. Grossman*, 15 Ill. 53.

¹⁵ Ante, § 50; *Gas-light, &c. Co. v. St. Mary Abbott's*, 15 Q. B. D. 1; *Esty v. Baker*, 48 Maine, 495; *The State v. Piper*, 89 N. C. 551; *Brown v. Manter*, 2 Fost. N. H. 468; *Norvell v. Gray*, 1 Swan, Tenn. 96; *Brown v. Perkins*, 1 Allen, 89; *Conklin v. White Water Valley Canal*, 3 Ind. 506; *Shaw v. Mussey*, 48 Maine, 247; *Benson v. Bolles*, 8 Wend. 175; *Norvell v. Thompson*, 2 Hill, S. C. 470; *McLeod v. Jones*, 105 Mass. 403; *Darling v. Kelly*, 113

§ 820. **Kicking through Fence.** — One whose horse at pasture injures another's by kicking through the partition fence, must pay the damages.¹ Also —

§ 821. **Water from Eaves.** — It is an actionable wrong so to construct a building on one's land that water will be projected from its roof upon a neighbor's.²

§ 822. **The Justifications** — for entering on another's premises are many; as, to execute legal process,³ license,⁴ necessity,⁵ to build a division fence required by statute,⁶ to preserve the peace,⁷ to arrest the spreading of a contagious disease.⁸

§ 823. **Presumed Permission.** — Many of the every-day acts which would constitute trespasses to land if done against the will of the owner are rendered harmless by his presumed permission. For example, one who has constructed a walk from the street to the outer door of his house presumptively invites any intending caller for a lawful purpose⁹ to pass over it. At the door, such person obtains leave to enter or is refused, as the occupant pleases; but if the house is a private one, an entry without such consent is a trespass.¹⁰ If it is an inn, the keeper's permission to enter it need not be specially asked, it comes as of right from the law.¹¹ Now, —

§ 824. **Ejecting.** — Under many circumstances, one may not unreasonably assume that an owner will not object to his coming upon his lands though there is no affirmative presumption of permission. For which and other reasons, it has

Mass. 29; Hatch v. Donnell, 74 Maine, 163; Hoehl v. Muscatine, 57 Iowa, 444; Fulleam v. Muscatine, 57 Iowa, 457; Beckwith v. Shordike, 4 Bnr. 2092; Hill v. Cincinnati, &c. Ry. 109 Ind. 511; Dyson v. Collick, 5 B. & Ald. 600.

¹ Ellis v. Loftus Iron Co. Law Rep. 10 C. P. 10.

² Ante, § 417; Martin v. Simpson, 6 Allen, 102; Hazeltine v. Edgmand, 35 Kan. 202; Underwood v. Waldron, 33 Mich. 232.

³ Crowther v. Ramsbottom, 7 T. R. 654; Howe v. Butterfield, 4 Cush. 302; Chipman v. Bates, 15 Vt. 51; Yeager v. Carpenter, 8 Leigh, 454.

⁴ Ante, § 49-53; Bishop Con. § 1299-1301; Wing v. Hall, 47 Vt. 182; Williams v. Morris, 8 M. & W. 488.

⁵ Ante, § 126, 161-163, 169, 173; Prerogative Case, 12 Co. 12; Arundel v. McCulloch, 10 Mass. 70; Campbell v. Race, 7 Cush. 408.

⁶ Carpenter v. Halsey, 60 Barb. 45.

⁷ Rex v. Smith, 6 Car. & P. 136; Hancock v. Baker, 2 B. & P. 260.

⁸ Ante, § 125, 164, 414; Seavey v. Preble, 64 Maine, 120.

⁹ Gilmore v. Wale, Anthon, 2d ed. 87.

¹⁰ Adams v. Freeman, 12 Johns. 408.

¹¹ Ante, § 392.

become a rule of law that, whenever a person has entered another's premises peaceably, the occupant cannot lawfully eject him by force unless he first requests him to depart.¹ But such previous request is not necessary where the entry was by force and violence.² In either case, the necessary preliminary having thus transpired, the occupant may eject the intruder by such force in degree and kind as is reasonably necessary, yet no more.³ And still, —

§ 825. **Breach of Peace.** — If persons on one's premises misconduct themselves to the extent of creating a riot or other breach of the peace, they may be lawfully given into custody.⁴ On the other hand, if the expulsion from the premises is done in such a tumultuously unlawful manner as to constitute a breach of the peace, — for example, a forcible detainer, — the party thus acting, yet having the rightful possession, will not necessarily be liable to the other in a civil suit.⁵

IV. *One's Use and Misuse of his Own Realty.*

§ 826. **Elsewhere.** — The subject of this sub-title extends forward and in a measure covers the next chapter as well as the remainder of this.

§ 827. **No Injury to Others.** — From principles explained in the earlier parts of this volume, we derive the conclusion that no one can incur a liability for what he does on his own land, however far it may be from anything intrinsically proper, judicious, useful, or harmless, unless another person has been damnified thereby.⁶ Moreover, —

§ 828. **Injury.** — Though an injury has resulted to another, it does not follow that he who in pursuing his own interests caused it, must compensate him; that will depend on prin-

¹ *Ballard v. Bond*, 1 Jur. 7; *The State v. Burke*, 82 N. C. 551; *The State v. Woodward*, 50 N. H. 527.

² *Tullay v. Reed*, 1 Car. & P. 6; *Green v. Goddard*, 2 Salk. 641; *Polkinhorn v. Wright*, 8 Q. B. 197.

³ *Green v. Bartram*, 4 Car. & P. 308; *Oakes v. Wood*, 2 M. & W. 791; *Greg-*

ory v. Hill, 8 T. R. 299; *Jones v. Jones*, 71 Ill. 562; *Abt v. Burgheim*, 80 Ill. 92.

⁴ *Cohen v. Huskisson*, 2 M. & W. 477.

⁵ Ante, § 197; *Souter v. Codman*, 14 R. I. 119.

⁶ Ante, § 22, 98, 102.

ciples already considered,¹ and to be further brought under review in the present sub-title. The doctrine is that —

§ 829. **Defined.** — One may not, either voluntarily or negligently, cast earth or other substance from his own ground on a neighbor's; or upon his own bring or erect anything, or change the natural position of anything, from which the air, the moving water, or any other force of nature will bear to another on other land what is distinctly injurious to him; or, by any excavation, structure, or other change of his premises from their natural condition, render them unsafe to other persons and their property lawfully thereon; while yet these restraints will not be drawn so closely as substantially to deprive him of the use of his lands, or the ordinary pursuit of his own interests, or to render him answerable for inevitable accidents injuring others. More particularly, —

§ 830. *Casting Things from Own Ground on Neighbor's : —*

General. — This is one of the forms of abusing a neighbor's realty, explained in the last sub-title; as, where one plants on his own ground a tree which sends its roots into a neighbor's well,² or builds a roof which projects water on a neighbor's soil,³ or sends up a rocket which falls on a neighbor's premises and does mischief.⁴ Other of the common illustrations are —

§ 831. **Blasting.** — The precise extent of one's right to blast rocks on his own ground, in the prosecution of a lawful business, may not be very accurately defined. He can do it in a sparsely inhabited country away from all dwelling-houses, and where the few persons put in peril are notified of each coming blast.⁵ But to attempt it to the endangering of a dwelling-house⁶ is evidently a private nuisance; or, in a city, to the peril of many people and their buildings, is a public nuisance; and, in either case, he who does it is responsible for the injury inflicted. Nor, in these circumstances, is it a defence that the work was carefully performed; the act, when it results in

¹ Ante, § 11, 14, 98, 102-107; *Victory v. Baker*, 67 N. Y. 366.

² Ante, § 819.

³ Ante, § 821; *Bellows v. Sackett*, 15 Barb. 96.

⁴ *Fisk v. Wait*, 104 Mass. 71.

⁵ *Driscoll v. Newark, &c. Co.* 37 N. Y. 637.

⁶ *Hay v. Cohoes Co.* 2 Comst. 159; *Beauchamp v. Saginaw Min. Co.* 50 Mich. 163.

injury, is a trespass, and the question of negligence does not arise.¹

§ 832. **Steam-boiler.** — A steam-boiler does not, as ordinarily blasting does, send into the air and surrounding grounds death-producing missiles. Therefore one who makes a lawful use of it in the carrying on of his business is responsible, should it burst and do damage to neighboring premises or persons, only if there is in it some defect which he ought to have discovered, or if it is run negligently.² *A fortiori*, —

§ 833. **Fire.** — Since fire, one of the most beneficent servants of man, does not from its own nature imperil surrounding persons and objects, the careful setting and keeping of it in one's dwelling-house, shop, field, or elsewhere, for a useful purpose, creates no liability to another injured by its spreading, through some accident not reasonably to be anticipated.³ But a fire set or looked after negligently, if by reason of such negligence it communicates to a neighbor's property and de-

¹ *Ib.*; Wright v. Compton, 53 Ind. 337; Colton v. Onderdonk, 69 Cal. 155; Losee v. Buchanan, 51 N. Y. 476, 479, explaining Hay v. Cohoes Co. supra; Tiffin v. McCormack, 34 Ohio State, 638, 644.

² Ante, § 184; Marshall v. Welwood, 9 Vroom, 339; Losee v. Buchanan, 51 N. Y. 476; Spencer v. Campbell, 9 Watts & S. 32.

³ Catron v. Nichols, 81 Mo. 80; Miller v. Martin, 16 Mo. 508; Clark v. Foot, 8 Johns. 421; Barnard v. Poor, 21 Pick. 378; Jacobs v. Andrews, 4 Iowa, 506; Hanlon v. Ingram, 3 Iowa, 81; Fahn v. Reichart, 8 Wis. 255. The statute of 6 Anne, c. 31, § 6, declares that no action shall be maintained "against any person in whose house or chamber any fire shall accidentally begin, or any recompense be made by such person for any damage suffered or occasioned thereby." This statute is common law in New York. Lansing v. Stone, 37 Barb. 15, 14 Abb. Pr. 199; Webb v. Rome, &c. Rld. 49 N. Y. 420. It is probably such also in most of our other States. In 1774, too

late for English statutes to be common law with us, it was re-enacted in a larger form of the expression by 14 Geo. 3, c. 78, § 86. "The ancient law, or rather custom of England," says Lord Denman, C. J. "appears to have been, that a person in whose house a fire originated, which afterwards spread to his neighbor's property and destroyed it, must make good the loss." Filliter v. Phippard, 11 Q. B. 347, 354. As to which see also Tubervil v. Stamp, 1 Salk. 18; Anonymous, Cro. Eliz. 10, in which latter case it was held that, if one in his own house sets it on fire by shooting out at a fowl, he is responsible; "for the injury is the same although this mischance was not by a common negligence but by misadventure." The ancient common law, as thus stated, does not accord with common-law principles as at present held both in England and in the United States. The statute is construed as not applying to a fire lighted intentionally. Filliter v. Phippard, supra, or negligently, Webb v. Rome, &c. Rld. supra.

stroys it, will give the neighbor an action for the damages.¹ To illustrate, —

§ 834. *Instances.* — In a room containing oil cans, and inflammable waste scattered around the stove, one can being on the stove, the occupant set the damper wide open, locked the door, and departed. From this evidence, a fire having been engendered doing damage, a jury was held to be justified in finding the negligence which rendered the proprietor responsible.² Again, on land used for agriculture, it is lawful and sometimes necessary to set fires to burn dry grass and stubble, and other combustible things, but not lawful at a time or in a manner rendering it probable that damage will result to a neighbor.³ Thereupon, one kindled on his land a fire for such a purpose, and attempted to extinguish it the same day; but it continued smouldering in the soil of a slough until, two days later, it broke out and did damage. And it was held that, if the kindling was negligent, he was not excused because he could not foresee this breaking out.⁴ A gas company conducted the work of putting in gas so negligently that it escaped, ignited, and burned a neighboring building; and for this burning the company was held to be responsible.⁵ One negligently put upon the extremity of his land a haystack in too green a state. It gave out evidences of approaching combustion, but he declined to pay any attention to them; then it burst into flames, and consumed adjoining property of a neighbor. He was held to be liable.⁶ Sparks thrown out in engendering steam may, or not, render one responsible to another for the damages, according as under the circumstances the act was negligent or otherwise.⁷

¹ *Turbervil v. Stamp*, Comb. 459, 12 Mod. 152; *Littleton v. Cole*, 5 Mod. 181; *Higgins v. Dewey*, 107 Mass. 494, 496; *Bachelor v. Heagan*, 18 Maine, 32; *Hewey v. Nourse*, 54 Maine, 256; *Garrett v. Freeman*, 5 Jones, N. C. 78; *Gibbons v. Wisconsin Valley Rld.* 66 Wis. 161.

² *Read v. Pennsylvania Rld.* 15 Vroom, 280.

³ *Dewey v. Leonard*, 14 Minn. 153; *Hays v. Miller*, 6 Hun, 320.

⁴ *Krippner v. Biebl*, 28 Minn. 139.

⁵ *Blenkiron v. Great Cent. Gas Con. Co.* 3 L. T. N. S. 317.

⁶ *Vaughan v. Menlove*, 3 Bing. N. C. 468, 1 Jur. 215, 7 Car. & P. 525.

⁷ *Read v. Morse*, 34 Wis. 315; *Moomey v. Peak*, 57 Mich. 259; *Adams v. Young*, 44 Ohio State, 80; *Lawton v. Giles*, 90 N. C. 374; *Crandall v. Goodrich Transp. Co.* 16 Fed. Rep. 75.

§ 835. **Flames carried by Wind.**—Regarded as the act of God,¹ or as a new and independent force,² a wind bearing the flames from the premises of one who negligently caused them, to another's, may be a form of their transmission which will not found an action for the damages.³ But this will not be so under all circumstances.⁴

§ 836. **Subsequent Communication of Fire.**—According to some opinions, if a fire for which one is answerable communicates to the premises of a second person and thence to those of a third, he cannot be required to pay the third person's damages.⁵ But this is contrary to what we saw in an early chapter to be the just doctrine of the English and most American courts;⁶ and it is generally repudiated, the liability extending to all the natural and probable consequences of the negligent act.⁷

§ 837. **Statutes**—have in some States, and in some degree, regulated this question of fires.⁸

§ 838. **Water**—is a necessary for man; and, like fire, and like food, it is employed for the protection and sustenance of the body, for the turning of useful machinery, and in various other ways. Hence the rules just stated as to fire and steam apply to water also.⁹ Where water is supplied through pipes for domestic and other like uses, if the leakage or bursting of a water-pipe on one's premises causes injury upon adjoining land, the person responsible for the condition of the pipe is required to indemnify the other only if there was in it an original defect which he ought to have discovered, or some

¹ Ante, § 157, 158.

² Ante, § 42.

³ *Pennsylvania Co. v. Whitlock*, 99 Ind. 16. See ante, § 138; *Averitt v. Murrell*, 4 Jones, N. C. 322.

⁴ *Smith v. London, &c. Ry. Law Rep.* 5 C. P. 98, 6 C. P. 14; *Perley v. Eastern Rld.* 98 Mass. 414, 418.

⁵ *Ryan v. New York Cent. Rld.* 35 N. Y. 210; *Pennsylvania Rld. v. Kerr*, 12 Smith, Pa. 353.

⁶ Ante, § 40-48.

⁷ *Delaware, &c. Rld. v. Salmon*, 10 Vroom, 299; *Annapolis, &c. Rld. v.*

Gantt, 39 Md. 115, 141; *Perley v. Eastern Rld.* 98 Mass. 414; *Milwaukee, &c. Ry. v. Kellogg*, 94 U. S. 469. And see *Adams v. Young*, 44 Ohio State, 80; *Cook v. Johnston*, 58 Mich. 437.

⁸ See, for example, *Brunell v. Hopkins*, 42 Iowa, 429; *Lamb v. Sloan*, 94 N. C. 534; *Grannis v. Cummings*, 25 Conn. 165; *Roberson v. Kirby*, 7 Jones, N. C. 477.

⁹ *Ross v. Fedden*, *Law Rep.* 7 Q. B. 661; *Blyth v. Birmingham Waterworks*, 11 Exch. 781.

negligence in its care.¹ One, to carry away the water from his roof, collected it in a box, whence it descended through a pipe to the sewer. A rat ate a hole in the box, and the water flooded the premises of another to whom he had let the lower story, doing damage. The former, being guilty of no negligence, was held not to be responsible, — partly, perhaps, on the ground that the rat-hole was the act of God.² One who carelessly leaves open a water-pipe may be liable for the damages.³ We have a like illustration in the case of a —

§ 839. **Reservoir Mill-pond.** — The owners of a mill, to render their supply of water more complete, constructed an artificial pond, and diverted water into it. The place was a coal-mining region, where there were numerous vertical shafts and lateral workings. But it was not known to the mill-owners that there had been any mining at the particular spot selected for the reservoir. They employed a competent engineer and a competent contractor, for whose negligence they would be responsible to third persons as for their own, according to explanations in a preceding chapter.⁴ While these servants were proceeding in their work, they came upon five old shafts running vertically downward; “but, though the timber sides of three of them remained, the shafts themselves were filled up with soil. And it was not known to or suspected by the defendants, or any of the persons employed by them in making the reservoir, that they led down to old coal workings under its site;” though, palpably, they were thus put upon their inquiry, and placed under a duty to any one whose interests might be imperilled to proceed cautiously. A referee, on whose statement of the facts the case was decided, found that “with reference to the shafts met with, reasonable and proper care and skill were not exercised by the persons they employed, to provide for the sufficiency of the reservoir to bear the pressure of water which, when filled to the height proposed, it would have to bear.” So the work went on with no precautions, and

¹ *Terry v. New York*, 8 Bosw. 504. *Robbins v. Mount*, 4 Rob. N. Y. 553;

² *Carstairs v. Taylor*, Law Rep. 6 Ex. 217. *Killion v. Power*, 1 Smith, Pa. 429.

⁴ Ante, § 609.

³ *Moore v. Goedel*, 34 N. Y. 527;

precisely as though no artificially created defect in the bottom had been discovered. The water, when the reservoir was partly filled, rushed down these imperfectly closed old shafts, and along lateral workings, until it flooded and destroyed another person's mine. This person brought his suit for the damages, which plainly, on the ground of negligence, he ought to recover, and he recovered them. In the Court of Exchequer the majority of two judges to one decided against him; the Exchequer Chamber reversed this decision, and the House of Lords sustained the Exchequer Chamber.¹ But there was in this case a special feature, not uncommon in the reports; namely, that while a decision in distinction from the language of the judges pronouncing it is the part of the case which evidences the law and constitutes the precedent,² the judges in this case assigned reasons antagonistic to the reasonings of the law, therefore not to be followed in subsequent litigation. And this adjudication has been supplemented by another special consequence, not unfrequently met with in our books; namely, that subsequent judges and writers have treated the language of the judges as though it were decision, and cast a shadow over the law which in fact the case has settled.³ Further as to which,—

¹ *Fletcher v. Rylands*, 3 H. & C. 774, 11 Jur. N. S. 714, in the Ex.; Law Rep. 1 Ex. 265, 12 Jur. N. S. 603, in Ex. Ch.; *Rylands v. Fletcher*, Law Rep. 3 H. L. 330, in H. of L. And see *Wilson v. New Bedford*, 108 Mass. 261; *Shipley v. Fifty Associates*, 106 Mass. 194; *Everett v. Hydraulic, &c. Co.* 23 Cal. 225; *McKnight v. Ratcliff*, 8 Wright, Pa. 156, 168; *Smith v. Fletcher*, Law Rep. 7 Ex. 305, reversed, 9 Ex. 64; *Cahill v. Eastman*, 18 Minn. 324.

² Bishop Con. § 12.

³ *Reasonings of the Law and of the Judges distinguished — Jurist Work — (Rylands v. Fletcher).* — In the closing chapters of this volume will be found some explanations of the common law, of its manner of construction and apparent growth, of books, of

the peril of codification especially at the present chaotic period of the common law, and of the need of jurist writings explaining the reasonings of the law, in distinction from the imperfect reasonings too frequently found in our judicial reports and other law books. I propose, in the present note, to illustrate some of these things by this *Rylands and Fletcher* case. It has become a very leading case, being cited in most of the English and American ones subsequently decided. It is commonly understood not to be generally accepted in this country. As to which, the reader will find a statement in *Pennsylvania Coal Co. v. Sanderson*, 3 Am. Pa. 126. In truth, the point which it decides, as stated in the text, is law in all our States. Its judicial *dicta* have been in form accepted by the judges in a few

§ 840. **Degree of Care.**—No adjudication is required to make it plain that, if one takes water through a service pipe

of them, but rejected in most ; in the facts of actual decision, they are nowhere followed. Looking into the observations in the House of Lords, we find Lord Chancellor Cairns, in accordance with the view in the text, saying : "As regards the engineer and the contractor, we must take it from the case that they did not exercise, as far as they were concerned, that reasonable care and caution which they might have exercised, taking notice, as they appear to have taken notice, of the vertical shafts filled up in the manner which I have mentioned." p. 338. In a subsequent paragraph he adds : "And if, in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril ; and, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the plaintiff and injuring the plaintiff, then for the consequence of that, in my opinion, the defendants would be liable." p. 339. Now, taking these observations in connection with the rule that the language of a judge is always to be interpreted as qualified and limited by the facts in contemplation, post, § 1322 ("the lord chancellor's judgment in *Rylands v. Fletcher* must be read and understood with reference to the case before him," Hall, V. C. in *Crompton v. Lea*, Law Rep. 19 Eq. 115, 127), we find here a distinct enunciation of the proposition of the text, that one who builds a mill-dam reservoir negligently does it at his "own peril," and he must indemnify another who is injured by the escape of the water. Thus far, the opinion furnishes no ground for criticism. But it proceeds to indorse some not well con-

sidered language of Blackburn, J. who gave the opinion in the Exchequer Chamber. Lord Cranworth, who followed him, also indorsed Blackburn, and stated the rule to be : "If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage." p. 340. Here we come to the need of jurists. The function of a judge is to decide particular cases, each case depending on its own narrow facts. His instrument, to speak metaphorically, is the microscope. He sees and marks the very feet of the fly, but his eye does not sweep the horizon. These judges noted the facts of this case sufficiently to reach a correct conclusion. They applied the microscope, as duty required, and the application was an absolute success. If they had there stopped, they would have done their whole duty admirably. But when a judge, instead of stopping when he is through, marches on and usurps the ground of the jurist, he should expect neither the help of Heaven nor the approval of earth ; like any other trespasser, he is *prima facie* in the wrong, though an investigation may in the particular instance by chance show him to be in the right. "If," says this judicial proposition, "a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril." Thereupon, leaving now the judicial words and particularizing, if a man finds his house cold, and brings into it a fire, or if he keeps in a cave in his woods a keg of gunpowder for sale to customers, or if he has by his bedside a revolver for protection against burglars, or if in the country he runs by a steam engine a threshing-machine or

for use in his house, he will be negligent should he employ a pipe simply adequate to a pressure of ten pounds to the square inch, in the case of a pressure of one hundred pounds. And this principle is universal. Large masses of water are immensely powerful and highly dangerous; hence they require, when held by artificial means, corresponding strength in the restraining substances, and the greatest care and precaution, together with ample scientific learning, in those who plan and execute the work.¹ And precautions should be taken for all

grist-mill or saw-mill, or if he manufactures rockets wherewith to celebrate "the glorious fourth," or if he has a water-pipe for his bath tub, or a gas pipe for illumination, — each being a thing "which, if it should escape, may cause damage to his neighbor, — he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage." It is needless to say that such is *not* the law in any common-law country. We have seen, ante, § 833, note, that something like this was once held in England as to fire, but it is so nowhere now. Black-burn's leading illustration of the doctrine he lays down, "the case," he observes, "that has most commonly occurred, and which is most frequently to be found in the books, is as to the obligation of the owner of cattle which he has brought on his land, to prevent their escaping and doing mischief. The law as to them seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape; that is, with regard to tame beasts, for the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore; but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that

too." p. 280 of Law Rep. 1 Ex. Looking back to a preceding section, ante, § 801, we see that this is the rule established by the common law in the absence of fences. If one "brought on his land" a hungry ox untethered, and there was better pasturing on the adjoining land of a neighbor, the natural and probable consequence would be that, in the absence of a fence, the animal would walk over and eat and trample upon the neighbor's grass. This would be an act of gross negligence in the owner of the ox, not requiring so much as to be submitted to a jury. So that this case does not go even one step toward establishing the learned judge's rule. And the rest of his illustrations may be severally disposed of in the same or some similar manner. The reasoning, therefore, in this Fletcher and Rylands case, so far as it proceeds on ground other than negligence, is the individual reasoning of the judges, and not the reasoning of the law. If the same men should descend from the bench and become jurists, they would cast aside the microscope, always necessary in the judicial office, and of a value exceeding computation, and, taking the field-glass instead, sweep the horizon with a result beneficial to the law in a degree immeasurably beyond anything in the present contemplation of the legal profession.

¹ New York v. Bailey, 2 Denio, 433; Wendell v. Pratt, 12 Allen, 464.

extraordinary exigencies in the future, reasonably to be anticipated.¹ Then, —

§ 841. **Act of God.** — If, after all precautions have been made, excluding the idea of negligence, the overwhelming power which is technically called the act of God² intervenes and works injury, the party is not responsible. It was so held where, after one had collected large pools of water on his land, a sudden and extraordinary rainfall, amounting to *vis major*, swelled the feeding stream and swept away the embankments, resulting in damage to another.³ These cases will sometimes lead to —

§ 842. **Conflicting Rights.** — We saw in a preceding chapter that, in cases not involving the question of negligence, there will sometimes arise conflicts of rights between contiguous owners. And the only rule which we could discover for them was, that the right which the law deems superior, in which-ever party it lies, will prevail, and the inferior must yield.⁴ Now, as a general principle, it is plain that one engaged in mining for coal cannot throw a mixture of water, sand, and clay down upon the land of another, destroying it for cultivation, and escape responsibility to him.⁵ But how, if the former's land is valuable for mining, and useless for every other purpose, and he can work it only by inflicting harm on a neighbor? The majority of the Pennsylvania court held, that one operating a coal mine in the ordinary manner may, upon his own land, pump the water from it into a stream which forms the natural drainage of the basin wherein it is situated, though thereby swelling the stream,⁶ and so impairing the quality of its water as to render it unfit for domestic use, to the great injury of the lower owners. But this was strictly coal land, good for nothing else, and it could be mined in no

¹ Ante, § 440 ; Gray v. Harris, 107 Mass. 492. And see Pixley v. Clark, 35 N. Y. 520.

² Ante, § 166-172.

³ Nichols v. Marsland, Law Rep. 10 Ex. 255. Similar to this case is Madras Ry. v. Carvatenagarum, Law Rep. 1 Ind. Ap. 364, 9 Moak Eng. 289.

⁴ Ante, § 105-107.

⁵ Robinson v. Black Diamond Coal Co. 50 Cal. 460 ; Butler v. Peck, 16 Ohio State, 334.

⁶ Not as a general rule permissible. Livingston v. McDonald, 21 Iowa, 160.

other way. So that to prevent this use by the owner would in effect take from him his property.¹

§ 843. **Walls and Buildings.** — One who erects on the border of his land any structure which, if it falls, will injure adjoining premises or persons thereon, must exercise reasonable care in its original construction, and subsequently in keeping it in a safe condition. And if he fails in this, or in the suitable preservation of what another has put upon his land, whereby neighboring persons or things suffer damage by its falling, he must make recompense.² Plainly, within the rule that the care should be commensurate with the gravity of the consequences of an accident,³ the caution required to avoid the charge of negligence will in some of these circumstances be very considerable. But where a fire had left a wall standing,⁴ and the owner caused it to be carefully inspected by a competent person who, as well as himself, believed it to be safe, he was held not answerable for an injury suffered by another through its falling.⁵

¹ *Pennsylvania Coal Co. v. Sanderson*, 3 Am. Pa. 126, overruling *Sanderson v. Pennsylvania Coal Co.* 5 Norris, Pa. 401. And see *Crompton v. Lea*, Law Rep. 19 Eq. 115; *Gerrish v. Union Wharf*, 26 Maine, 384; *Victory v. Baker*, 67 N. Y. 366.

² *Lynds v. Clark*, 14 Mo. Ap. 74; *Mullen v. St. John*, 57 N. Y. 567.

³ *Ante*, § 840.

⁴ *Ante*, § 415.

⁵ *Schell v. Second Nat. Bank*, 14 Minn. 43. There are cases wherein the judges seem to have lapsed into a course of inconsiderate *dicta* on this subject, similar to those explained in a note a little way back. *Ante*, § 839, note. Thus, in *Kappes v. Appel*, 14 Bradw. 170, it was held, in accordance with the text, that the owner of a house which from want of repair falls on his neighbor's, is liable for the damages. For it is negligence, beyond all question, to permit one's house to stand without repair till it tumbles. Thereupon, in a head-note to this case, we read: "An owner

of land has the same duty to keep on his own land a house or wall built thereon, as the filth in his cesspool or the water in his reservoir or the snow upon his roof. His duty is to keep it in such a state that his neighbor may not be injured by its fall." Here is a bringing in of foreign matter, not all of which is relevant. We have seen how it is with the reservoir. *Ante*, § 839. As to the roof, if a man so constructs it that the snow will be projected on his neighbor's ground, there is no question of negligence; it is the same as though he so pointed a fire-arm that the ball would enter his neighbor's barn. There is not the slightest analogy between this case and that of a negligently constructed or negligently kept wall or house. Again, in *Gorham v. Gross*, 125 Mass. 232, a landowner had contracted with a firm of masons to build a party wall; it was done, and the wall accepted. Then the wall fell on the adjoining premises and did damage, to recompense which the owner was sued.

§ 844. *Putting on One's Own Ground that from which Natural or other like Forces will bear Injury to Another:—*

Nuisance.—This is a wrongful act known under the name of nuisance. It has already been treated of in a separate chapter.¹

§ 845. *Doing on One's Own Ground what may bring harm to other Persons or their Property there:—*

As to Trespassers.—The owner of land is entitled to keep it in whatever condition he will, so long as he violates no duty to another. And he owes no duty to one who comes upon it without right; so that such a person, if injured in consequence of the ill condition of the premises, can maintain no action against him.² Thus, one crossing another's grounds unauthorized fell into a pool of water over which a crust had formed resembling dry land, and it was held that the owner was not responsible for the damage, being under no obligation to keep the place safe for trespassers.³ The same rule applies to trespassing animals; if a horse, trespassing, falls into a pit and dies, or a trespassing cow is killed by drinking maple syrup negligently left in a sugar orchard, no right of action accrues to the owner of the animal.⁴ This doctrine is limited to cases in which the land-owner does not step aside to inflict a purposed harm. But—

§ 846. **Wilful Injury to Trespasser.**—We saw in our earlier

“There was evidence,” said the learned judge in delivering the opinion, “tending to show that the fall of the wall was occasioned by negligence in building it without sufficient stays or supports, or in building it in such cold weather that the mortar froze as soon as laid and was afterwards softened by a sudden thaw.” p. 238. The owner being deemed responsible for this negligence, it was held, as of course, that he must pay the damages. But, just as in the reservoir case of Rylands and Fletcher, explained in the preceding note, the learned judge who delivered the opinion was not content to leave the decision here; he travelled on, usurping jurist ground, and did the

same ill work, in an opinion which, properly understood, is mere *dictum*.

¹ Ante, § 409–432.

² Ante, § 60; *Hargreaves v. Deacon*, 25 Mich. 1; *Victory v. Baker*, 67 N. Y. 366; *Lary v. Cleveland, &c.* Rld. 78 Ind. 323; *Evansville, &c. Rld. v. Griffin*, 100 Ind. 221; *Maenner v. Carroll*, 46 Md. 193; *Kohn v. Lovett*, 44 Ga. 251; *Gillespie v. McGowan*, 4 Out. Pa. 144.

³ *Union Stock-yards, &c. Co. v. Rourke*, 10 Bradw. 474.

⁴ *Blyth v. Topham*, Cro. Jac. 158; *Bush v. Brainard*, 1 Cow. 78. Compare with *Jones v. Nichols*, 46 Ark. 207; *Beck v. Carter*, 68 N. Y. 283; *Hanghey v. Hart*, 62 Iowa, 96.

chapters that there is a marked distinction between a careless and a wilful injury.¹ And though one is unlawfully on another's premises, the latter will be answerable should he, instead of removing him by just enough of force to accomplish the purpose, needlessly beat him,² or wilfully inflict on him any other physical harm.³ This sort of question occasionally arises where an owner undertakes to protect his grounds or buildings by some automatic force. If he could invent a machine possessed of a perfect knowledge of the law and of facts, standing at the beginning of a difficulty in the exact position occupied by the jury and the court of last resort after it is over, there would be a vast diminution in the expense of supporting police and detectives. One of the methods, sometimes resorted to, is the setting of —

§ 847. **Spring-guns.** — A spring-gun is an engine which may do grievous damage to one treading upon its wire. Looking at the question in the light of principle, if a man sets such a gun to guard his dwelling-house, and a burglar, attempting to break in at night, is by it injured or killed, the owner is under neither a civil nor a criminal liability; because he had the right to take life, or use any less force, for the protection of his habitation and to prevent a felony. And so the law is believed to be.⁴ Yet whatever be the location of the spring-gun, it being laid, not accidentally or carelessly, but with the purpose of inflicting harm, should now the trespasser, unwarned, receive from it an injury which would be unlawful were it to proceed from the owner's own hand if present, a liability is, in principle, and it is believed on the authorities, incurred.⁵ But if the person trespassing is notified that there are spring-guns, the case has been deemed to have become analogous to that of a barbed wall, which a man knowing its condition attempts to scale in the night; the spring-guns create a barrier which he can pass only at his peril.⁶ What qualification this

¹ Ante, § 16, 142-154.

² Ante, § 61, 824; *Clark v. New York, &c. Rld.* 40 Hun, 605.

³ *Hargreaves v. Deacon*, 25 Mich. 1, 4.

⁴ 1 Bishop *Crim. Law*, § 854-856.

⁵ *Bird v. Holbrook*, 4 Bing. 628;

Jay v. Whitfield, stated, 3 B. & Ald. 308; *Hooker v. Miller*, 37 Iowa, 613;

Victory v. Baker, 67 N. Y. 366, 370.

⁶ *Ilott v. Wilkes*, 3 B. & Ald. 304.

And see *Jordin v. Crump*, 8 M. & W.

doctrine may require there are no means of precisely stating on authority. In most circumstances, the announcement of a purpose to do upon a contingency what would otherwise be unlawful is no protection to the subsequent doer. Should one threaten to shoot another on finding him walking across his field, then execute the threat, he would be answerable, at least, to the criminal law.¹ And something of this doctrine must, in some forms of the fact, find its way into the civil suit. For many years back, down to the present time, English statutes have made the setting of spring-guns criminal.

§ 848. **As to Persons rightfully on Premises.** — The owner of land owes to all persons rightfully upon it the duty to keep it in a condition reasonably safe to them. And one injured through a neglect of this duty may have of him compensation.² Thus, —

§ 849. **Instances.** — If the proprietor of a wharf negligently permits it to rot down, one rightfully on it, injured by the fall, may recover of him the damages.³ Upon a wharf where foreign vessels were unladen, a custom-house officer was in the night searching for smuggled goods, and he fell into the water through an opening left unlighted and unguarded: the wharf-owner was held answerable to him for the injury.⁴ Proprietors of a fair ground allotted a portion to target-shooting, but neglected to give notice thereof. A person admitted hitched his horse among other horses, and it was shot. The proprietors were adjudged liable.⁵ It is the same if, in like circumstances, a negligently constructed building breaks down and does damage.⁶ More particularly as to what is negligence, —

782; *Loomis v. Terry*, 17 Wend. 496; *Mich.* 261; *Post v. Stockwell*, 44 Hun, 28; *Johnson v. Bruner*, 11 Smith, Pa. 28; *Palmer v. Dearing*, 93 N. Y. 7; *Baltimore, &c. Rld. v. Rose*, 65 Md. 485; 58; *Learoyd v. Godfrey*, 138 Mass. 315. *Taylor v. Carew Manuf. Co.* 140 Mass. 150. ³ *Albert v. The State*, 66 Md. 325. ⁴ *Low v. Grand Trunk Ry.* 72 Maine, 313.

¹ 1 Bishop Crim. Law, § 875, 876. And see *Simpson v. The State*, 59 Ala. 1; *Johnson v. Patterson*, 14 Conn. 1.

² *Harris v. Perry*, 89 N. Y. 308, 312; *Welch v. McAllister*, 15 Mo. Ap. 492; *Stratton v. Staples*, 59 Maine, 94; *Shattuck v. Rand*, 142 Mass. 83; *Broderrick v. Detroit Union Rld. &c. Co.* 56

⁵ *Conrad v. Clauve*, 93 Ind. 476.

⁶ *Latham v. Roach*, 72 Ill. 179; *Currier v. Boston Music Hall Assoc.* 135 Mass. 414. In *Edwards v. New York, &c. Rld.* 98 N. Y. 245, the court was divided as to the responsibility of the lessor of the building. See also

§ 850. **Non-compliance with Law.** — Within the principle that to omit what a statute commands is negligence,¹ if one builds in disobedience, — for example, not providing the law-required elevator railings or fire-escapes, — then if injury to another follows therefrom, his liability for the damages is, as respects the element of negligence, fixed. But the injured person, to recover them, must also have been rightfully in the place, and free from contributory negligence.²

§ 851. **Within Structure.** — The arrangements within a building where workmen are employed, or other people are coming and going, should be made with a view to avoiding accidents. A breach of this duty will render the proprietor answerable to one injured thereby, if properly at the place of the accident, and not contributorily negligent. The particulars are numberless and varying.³ Also, —

§ 852. **The Approaches** — to the building, so far as they are under the control of the proprietor, should be made reasonably safe to persons rightfully using them. A neglect of this duty creates the responsibility we are now considering.⁴

§ 853. **Enticement.** — The proprietor who entices a person or thing upon his premises cannot treat the case as one of unlawful intrusion. Thus, if on his own land near a highway or a neighboring house he sets a trap baited with meat which will send an odor out into the air, and a dog that smells it is caught, he is answerable to the owner of the dog.⁵ In like manner, while the mere neglect to notify trespassing men off one's premises will not create a liability to them,⁶ any acts

Francis v. Cockrell, Law Rep. 5 Q. B. 501.

¹ Ante, § 140, 445, 652.

² *McRickard v. Flint*, 13 Daly, 541; *Taylor v. Carew Manuf. Co.* 143 Mass. 470; *Willy v. Mulledy*, 78 N. Y. 310; *Parker v. Barnard*, 135 Mass. 116. And see *Lee v. Smith*, 42 Ohio State, 458.

³ *Neff v. Broom*, 70 Ga. 256; *Taylor v. Carew Manuf. Co.* 140 Mass. 150; *Russell v. Tillotson*, 140 Mass. 201; *Handyside v. Powers*, 145 Mass. 123; *Ryan v. Wilson*, 87 N. Y. 471; *Palmer v. Dearing*, 93 N. Y. 7; *Pierce v. Whit-*

comb, 48 Vt. 127; *Clark v. Famous Shoe, &c. Co.* 16 Mo. Ap. 463; *Wannamaker v. Burke*, 1 Am. Pa. 423; *Clark v. Barnes*, 37 Hun, 389; *Johnson v. Bruner*, 11 Smith, Pa. 58.

⁴ *Buckingham v. Fisher*, 70 Ill. 121; *Chapman v. Rothwell, Ellis, B. & E.* 168; *Kohn v. Lovett*, 44 Ga. 251.

⁵ *Townsend v. Wathen*, 9 East, 277, 280, 281.

⁶ *Union Stock-yards, &c. Co. v. Rourke*, 10 Bradw. 474; *Pittsburgh, &c. Ry. v. Bingham*, 29 Ohio State, 364.

holding out an inducement or enticement will.¹ This rule has a wide application to —

§ 854. **Young Children.** — A child too young to be controlled by reason, therefore not improperly led by its instincts, receives from the law the protection which its special nature requires. For example, a man who leaves on his own ground open to the highway, or upon or beside any public place, a dangerous machine likely to attract children, will be liable to one injured by playing with it, if he neglected precautions against such an accident.² On this principle, railroads are held responsible, under proper circumstances, for injuries to young children playing with their turn-tables.³ But where there is nothing in the nature of allurements, an owner of land or other property is not obliged to encumber it with special safeguards for trespassing children, who will have against him only the same claims as adults under the like circumstances.⁴

§ 855. *Removing Things from one's Own Ground:* —

Another's Effects. — One who discovers on his own premises what belongs to another may put it off, but not in a way to do it or its owner needless damage.⁵ Thus, a man coming into possession of land, and finding thereon a block of stone of another, may remove it to some adjacent spot, but not to a distant one.⁶ When the thing has been properly taken to a suitable place, and there left for the use of the owner, if the latter does not employ reasonable diligence in taking it away,

¹ *Evansville, &c. Rld. v. Griffin*, 100 Ind. 221; *Campbell v. Portland Sugar Co.* 62 Maine, 552; *Murphy v. Boston, &c. Rld.* 133 Mass. 121.

² *Coppner v. Pennsylvania Co.* 12 Bradw. 600; *Keffe v. Milwaukee, &c. Ry.* 21 Minn. 207; *Porter v. Anheuser-Busch Brewing Assoc.* 24 Mo. Ap. 1.

³ *Stout v. Sioux City, &c. Rld.* 2 Dil. 294; *Nagel v. Missouri Pac. Ry.* 75 Mo. 653; *Gulf, &c. Ry. v. Styron*, 66 Texas, 421; *St. Louis, &c. Rld. v. Bell*, 81 Ill. 76.

⁴ *Chicago, &c. Rld. v. McLaughlin*, 47 Ill. 265; *Emerson v. Peteler*, 35

Minn. 481; *Mangan v. Atterton*, Law Rep. 1 Ex. 239; *Miller v. Woodhead*, 104 N. Y. 471; *Gillespie v. McGowan*, 4 Out. Pa. 144; *Miles v. Atlantic, &c. Rld.* 4 Hughes, 172; *Galligan v. Metacommet Manuf. Co.* 143 Mass. 527. And see *Fallon v. Central Park, &c. Rld.* 64 N. Y. 13; *Powers v. Harlow*, 53 Mich. 507; *Bransom v. Labrot*, 81 Ky. 638; *Rudd v. Richmond, &c. Rld.* 80 Va. 546; *Mackey v. Vicksburg*, 64 Missis. 777.

⁵ *Berry v. Carle*, 3 Greenl. 269; *Grier v. Ward*, 23 Ga. 145.

⁶ *Forsdick v. Collins*, 1 Stark. 173.

and from the neglect he suffers loss, he will be without remedy.¹

§ 856. **Own Soil.** — It is within fundamental principles that an owner may take away anything from his land, even the soil, when thereby he does not injure another.² And sometimes he may, even to another's damage.³ For example, the owner of mineral lands has been held entitled to remove all the minerals, though thereby water accumulates and passes off to the injury of an adjoining owner.⁴ We need not consider this class of cases further here, something more of them will appear in the next chapter.

§ 857. *Something of the Parties:* —

Participation. — We saw, in a preceding chapter,⁵ on what principles the various actors in a tort are liable for the damages. One, to be holden, must in some way have participated in it, but the form of participation is immaterial. Thus, —

§ 858. **Owner of Building — Tenant — Grantee.** — If the painter of a house fastens his hanging staging to the cornice, which was made for ornament and not for this sort of use, the house-owner will not be liable should it fall and injure him.⁶ And where one making repairs in a penitentiary fell down the elevator opening, he was held to have no claim against a contractor for the services of the convicts, who had over the elevator no control.⁷ So a landlord is not liable for a nuisance created by his tenant, where the latter, and not himself, is under the duty to repair;⁸ as, where a neighbor's cellar is overflowed by a leaky supply pipe.⁹ But in cases of this sort, a tenant in possession under a lease requiring him to keep the premises in repair, is answerable;¹⁰ yet not where he has a

¹ United States Manuf. Co. v. Stevens, 52 Mich. 330.

² Ante, § 12, 98, 102.

³ Ante, § 14, 102-107.

⁴ Lord v. Carbon Manuf. Co. 15 Stew. Ch. 157.

⁵ Ante, § 517 et seq.

⁶ Fanjoy v. Seales, 29 Cal. 243. See Khron v. Brock, 144 Mass. 516.

⁷ Cunningham v. Bay State, &c. Co. 93 N. Y. 481. And see Sinton v. Butler, 40 Ohio State, 158.

⁸ Kalis v. Shattuck, 69 Cal. 593; Pretty v. Bickmore, Law Rep. 8 C. P. 401; Moore v. Oceanic Steam Nav. Co. 24 Fed. Rep. 237. Yet see Ingwersen v. Rankin, 18 Vroom, 18; Leonard v. Decker, 22 Fed. Rep. 741.

⁹ Harris v. Cohen, 50 Mich. 324. And see Hanse v. Cowing, 1 Lans. 288; Muller v. Stone, 27 La. An. 123.

¹⁰ Fisher v. Thirkell, 21 Mich. 1; Pretty v. Bickmore, supra; Union Brass Manuf. Co. v. Lindsay, 10 Bradw. 583.

mere holding from month to month without covenants.¹ One who sells or leases to another a house or other thing which, or in which, is a nuisance, under circumstances indicating his concurrence in its continuing, must pay the damages to a third person injured thereby.² But the lessee or grantee himself cannot commonly maintain against the grantor or landlord an action in this sort of case.³

§ 859. **Other Questions**, — more or less like these, are liable to arise. But their affinity is with the procedure, therefore they will not be particularly examined in the present connection.⁴

§ 860. *The Doctrine of this Chapter restated.*

The buildings on land are a part of the land itself. Fences are erected to prevent cattle straying or entering. Without a fence, the owner is at common law required to keep his cattle on his own grounds, and if they trespass on another's he is liable for the damages. But this is not held in all our States; and, in all, there are statutes creating a duty to fence, and burdens on those who disobey. And still, whether there are fences or not, no person may lawfully, without a permission either express or implied, go upon the land of another, or cast or cause to flow upon it any physical substance, or over it, while inhabited, any noxious or offensive odors or vapors. One who permits another to come upon his land must see that it is in a condition physically safe; and if, through any neglect in the discharge of this duty, the other after so coming is injured while himself free from negligence,

¹ Griffith v. Lewis, 17 Mo. Ap. 605.

² Helwig v. Jordan, 53 Ind. 21; Fow v. Roberts, 12 Out. Pa. 489; Martin v. Blattner, 68 Iowa, 286; Knauss v. Brua, 11 Out. Pa. 85.

³ Cowen v. Sunderland, 145 Mass. 363; Kabus v. Frost, 50 N. Y. Super. 72; Tuttle v. Gilbert Manuf. Co. 145 Mass. 169.

⁴ Edwards v. New York, &c. Rld. 98 N. Y. 245; Burdick v. Cheadle,

26 Ohio State, 393; Bartlett v. Boston Gas-light Co. 122 Mass. 209; Kent v. Todd, 144 Mass. 478; Woram v. Noble, 41 Hun, 398; Sullivan v. Davis, 29 Kan. 28; Hussey v. Ryan, 64 Md. 426; Odell v. Solomon, 99 N. Y. 635; McGill v. Compton, 66 Ill. 327; Moulton v. Moore, 56 Vt. 700; Samuelson v. Cleveland Iron Min. Co. 49 Mich. 164; Parcell v. Grosser, 13 Out. Pa. 617.

he must recompense him. A trespasser on the land may be gently turned back, or, refusing to depart on request, forced back, in a way not needlessly to injure him ; but he cannot be unnecessarily beaten, or in any circumstances killed. Dwelling-houses are in law places of retreat and asylum from persons not of the family, but other buildings furnish little or no protection to their occupants. One may use his own land as he will, except that, as in all the other activities of life, he must exercise carefulness, so as not unnecessarily to injure another. These general propositions have their details, a repetition whereof is not here desirable.

CHAPTER XXXVIII.

EASEMENTS AND SERVITUDES.

§ 861. Introduction.

862-865. In General.

866-876. Private Ways.

877-903. Under and Upper Waters.

904-919. Partitions and Supports.

920-924. Light and Air.

925. Doctrine of Chapter restated.

§ 861. **How Chapter divided.**—We shall consider, I. The Doctrine in General; II. Private Ways; III. Under and Upper Waters; IV. Partitions and Supports; V. Light and Air.

I. *The Doctrine in General.*

§ 862. **Terms.**—There are refinements in the use of the terms “easement” and “servitude,” not entering into the law itself, as to which writers differ. Explanations of them would be foreign to the purposes of this chapter. Employing these words in a way deemed by the present writer justifiable, while yet for it in exact form there is not the precedent of a universal usage,—

§ 863. **Defined.**—The terms “easement” and “servitude” are correlates; the easement being a right in the nature of an estate, and the servitude its corresponding burden. More exactly, an easement is an incorporeal hereditament or chattel interest, attached to the person of an individual or to the public, or to the land of either, in another’s land; a servitude is the burden on land imposed by the easement. There can be no

easement without a servitude, or servitude without an easement.¹ Thus, —

§ 864. **Illustrations.** — The right of the occupant of one piece of land to use water,² or the drains,³ or light and air,⁴ from another; of one person to go and remain at pleasure⁵ or deposit things⁶ on another's land, or bring his vessels to another's wharf,⁷ or have a way over land of another;⁸ or of one land-owner to compel an adjoining one to maintain a partition fence,⁹ — each of these is an easement. And the illustrations are numberless. We shall not consider all in this chapter; since —

¹ I am not aware that we have for these terms any definitions which have become standard. Kent says: "Under the head of easements may be included all those privileges which the public or the owner of neighboring lands or tenements hath in the lands of another, and by which the servient owner, upon whom the burden of the privilege is imposed, is obliged to suffer or not to do something on his own land for the advantage of the public, or of the dominant owner to whom the privilege belongs. These easements are incorporeal rights, and imposed upon corporeal property for the benefit of the public or of other corporeal property." 3 Kent Com. 419. Washburn, Easements, 3, says: "The essential qualities of easements are these: 1st, they are incorporeal; 2d, they are imposed on corporeal property, and not upon the owner thereof; 3d, they confer no right to a participation in the profits arising from such property; 4th, they are imposed for the benefit of corporeal property; and 5th, there must be two distinct tenements, — the dominant, to which the right belongs, and the servient, upon which the obligation rests. But it is not necessary that the dominant and servient estates should be in contiguity with each other." It is perceived that this defining, contrary to mine, excludes the possibility of a man's owning a mere personal easement, or ease-

ment in gross; as, for one who has no land, or without respect to land of his own, to pass over land of another. But it is not disputed that rights of this sort exist, and I see no good reason for excluding them from the definition. Washburn, at the place just cited, proceeds: "A contract for a right to pass over the lands of another is an easement extending only to a temporary disturbance of the owner's possession. The grantee of such an easement is not the owner or occupant of the estate over which the way is used." See also *Dark v. Johnston*, 5 Smith, Pa. 164; *Big Mountain Imp. Co.'s Appeal*, 4 Smith, Pa. 361; *Pierce v. Keator*, 70 N. Y. 419; *Parsons v. Johnson*, 68 N. Y. 62; *Tabor v. Bradley*, 18 N. Y. 109, 111.

² *Manning v. Wasdale*, 5 A. & E. 758; *Race v. Ward*, 4 Ellis & B. 702; *Ivimey v. Stocker*, Law Rep. 1 Ch. Ap. 396; *Stearns v. Janes*, 12 Allen, 582.

³ *Pyer v. Carter*, 1 H. & N. 916.

⁴ *Parker v. Foote*, 19 Wend. 309; *Dyer v. Sanford*, 9 Met. 395.

⁵ *Fuhr v. Dean*, 26 Mo. 116.

⁶ *Big Mountain Imp. Co.'s Appeal*, 4 Smith, Pa. 361; *Pollard v. Barnes*, 2 Cush. 191.

⁷ *Sargent v. Ballard*, 9 Pick. 251.

⁸ *Esling v. Williams*, 10 Barr, 126; *Kieffer v. Imhoff*, 2 Casey, Pa. 438; *Cook v. Chicago, &c. Rld.* 35 Ill. 460.

⁹ *Cheetham v. Hampson*, 4 T. R. 318; *Rider v. Smith*, 3 T. R. 766, 768.

§ 865. **What here.** — Not all the law of easements is within the sphere of this work. Largely it pertains to contract, or to prescription, which is a contract proved by use; and to the part of the law of contract commonly relegated to the head of real estate.¹ Public ways are easements, yet they are partly within the criminal law: to the part which is civil, and non-contract, a chapter is assigned further on. We shall in this chapter, doubtless leaving behind something not wholly irrelevant, consider simply, in addition to what has already been said, the easements indicated by its remaining sub-titles.

II. *Private Ways.*

§ 866. **Defined.** — A private way is the easement of one person, or of any number of persons less than the public at large, to pass over the servient land of another, in the manner, at the times, on the location, and for the purpose, allotted or agreed for the particular way.² It is either appurtenant or in gross. Thus, —

§ 867. **Appurtenant.** — Most ways are appurtenant; that is,

¹ Ante, § 6.

² **Something of Definitions.** — The convenience, to the reader or practitioner, of having before him the sort of condensed statement of the law of his subject which is commonly known by the term “definition,” is so great that it is a marvel how scarce the truly serviceable definitions are in our books. I mean, those which present the full-orbed idea, separated from whatever is superfluous, and not a mere segment of the sphere, either with or without needless attachments. I can find in the books no definition of a private way answering this call; though, partly in the nature of definition, or as definitions in part, we have many useful and instructive passages. Thus, from Lord Hale: “If a way lead to a market, and were a way for all travellers, and did communicate with a great road, &c. it is an highway; but if it lead only to a

church, to a private house or village, or to fields, then it is a private way.” Austin’s Case, 1 Vent. 189. Kent mentions a private way as an “incorporeal hereditament” (we shall see, that it is not always such, but it may be a mere life estate), and shortly says, that it “is a right of private passage over another man’s ground.” 3 Kent Com. 419. Herein he follows Blackstone, who terms it “the right of going over another man’s ground.” 2 Bl. Com. 35. And Washburn copies the same segment of a defining. Easements, 161. The only objection to this short definition is, that it is a mere scrap of the idea, presenting no rounded view of the thing meant. It satisfies the literary taste: for it is plain and direct, unincumbered by verbiage, making little demand on the attention, and not overloading the feeblest understanding. Its non-usefulness is its only legal defect.

instead of being personal to the individual, they are appurtenances of some particular land and inseparable therefrom, so that any one entitled to use the land as owner or otherwise may enjoy the ways over its servient lands.¹ A conveyance of the dominant land conveys its appurtenant ways;² and, if a part is sold to one person and the rest to another, both purchasers may enjoy them,³ the ordinary rule being that a way appurtenant to the whole is appurtenant to every parcel of it however minutely divided.⁴ The inclination of interpretation is to make every way appurtenant, instead of in gross;⁵ or, more strongly, a way will never be presumed to be in gross when it can be construed as appurtenant.⁶ But —

§ 868. **In Gross.** — A way may be, and sometimes is, in gross. The meaning of which is, that it is the way of a particular individual, personal to him, and not attached to any land.⁷ Like a way appurtenant, it is an incorporeal right; and plainly it may be for a stated number of years, or to expire on a contingency,⁸ or for the life of its owner. Perhaps there is no absolute impediment of reason to its being made hereditary; as, where it is created by a deed to a man and his heirs. But this would be, at least, a great practical inconvenience in the law, and the courts ordinarily⁹ refuse to permit it; holding that, in all cases, whatever be the terms of its creation, it dies with the individual owner, nor during his

¹ *Shroder v. Brenneman*, 11 Harris, Pa. 348; *Skull v. Glenister*, 16 C. B. N. s. 81. *Thorpe v. Brumfitt*, Law Rep. 8 Ch. Ap. 650.

² *Kent v. Waite*, 10 Pick. 138; *Lide v. Hadley*, 36 Ala. 627; *Rhea v. Forsyth*, 1 Wright, Pa. 503; *Moore v. Crose*, 43 Ind. 30; *Cannon v. Boyd*, 23 Smith, Pa. 179.

³ *Watson v. Bioren*, 1 S. & R. 227; *Underwood v. Carney*, 1 Cush. 285; *Bartlett v. Prescott*, 41 N. H. 493.

⁴ *Whitney v. Lee*, 1 Allen, 198; *Miller v. Washburn*, 117 Mass. 371. And see *Pettingill v. Porter*, 3 Allen, 349; *McCarty v. Kitchenman*, 11 Wright, Pa. 239.

⁵ *Washb. Easms.* 161. And see

⁶ *Sanxay v. Hunger*, 42 Ind. 44. It has been held that, where the owner of a tract of land conveys half of it by a deed reserving a right of way across it, and giving to the purchaser a corresponding right across the unsold half, both ways are in gross. *Wagner v. Hanna*, 38 Cal. 111. And see *Garrison v. Rudd*, 19 Ill. 558.

⁷ 3 Bl. Com. 241.

⁸ *Hall v. Armstrong*, 53 Conn. 554.

⁹ In Massachusetts, a way in gross is said to be hereditary and assignable. *Goodrich v. Burbank*, 12 Allen, 459, 460, 461.

life is it assignable.¹ Nor yet can the owner make it appurtenant to his lands.²

§ 869. **Creation.**—We need not minutely inquire into the methods of creating private ways. In brief, they are varying; as, by grant,³ by reservation in a deed of the land,⁴ by prescription which presumes a grant,⁵ necessity,⁶ a laying out under the authority of a statute.⁷ Evidently, in some of the States, there may be a private way by dedication,⁸ at least where it consists of the substitution of a new way for an old one;⁹ but the English and probably the general American doctrine is, that, though there may be a limited dedication of a public way,¹⁰ there can be no private way by dedication.¹¹

¹ 3 Kent Com. 420; 2 Bl. Com. 35, 36; *Boatman v. Lasley*, 23 Ohio State, 614; *Post v. Pearsall*, 22 Wend. 425, 432; *Garrison v. Rudd*, 19 Ill. 558.

² *Ackroyd v. Smith*, 10 C. B. 164, 14 Jur. 1047; *Boatman v. Lasley*, *supra*.

³ *Senhouse v. Christian*, 1 T. R. 560; *Roberts v. Karr*, 1 Taunt. 495; *Duncan v. Louch*, 6 Q. B. 904; *Dickinson v. Whiting*, 141 Mass. 414; *Baker v. Frick*, 45 Md. 337; *Rowell v. Doggett*, 143 Mass. 483; *Watts v. Kelson*, Law Rep. 6 Ch. Ap. 166.

⁴ *Ante*, § 867, note; *Wiswell v. Minogue*, 57 Vt. 616; *Myers v. Dunn*, 49 Conn. 71; *Brunton v. Hall*, 1 Q. B. 792; *Dand v. Kingscote*, 6 M. & W. 174; *Bowen v. Conner*, 6 Cush. 132.

⁵ *Cheney v. O'Brien*, 69 Cal. 199; *Jamaica Pond, &c. Corp. v. Chandler*, 121 Mass. 3; *Zigefoose v. Zigefoose*, 69 Iowa, 391; *Black v. O'Hara*, 54 Conn. 17; *Parks v. Bishop*, 120 Mass. 340; *Gay v. Boston, &c. Rld.* 141 Mass. 407; *Wheeler v. Clark*, 58 N. Y. 267; *Deerfield v. Connecticut River Rld.* 144 Mass. 325; *Smith v. New York, &c. Rld.* 142 Mass. 21; *Plimpton v. Converse*, 42 Vt. 712; *Gayetty v. Bethune*, 14 Mass. 49; *Connor v. Sullivan*, 40 Conn. 26; *Webster v. Lowell*, 142 Mass. 324.

⁶ *Derrickson v. Springer*, 5 Harring.

Del. 21; *Sanxay v. Hunger*, 42 Ind. 44; *Brown v. Berry*, 6 Coldw. 98; *Bass v. Edwards*, 126 Mass. 445.

⁷ *Flagg v. Flagg*, 16 Gray, 175, 178; *Robinson v. Swope*, 12 Bush, 21; *Keeling's Road*, 9 Smith, Pa. 358; *Metzler's Road*, 12 Smith, Pa. 151; *People v. Richards*, 38 Mich. 214; *Jacocks v. Newby*, 4 Jones, N. C. 266; *Hickman's Case*, 4 Harring. Del. 580; *Johnson v. Stayton*, 5 Harring. Del. 448; *Jones v. Barclay*, 2 J. J. Mar. 73; *Pocopson Road*, 4 Harris, Pa. 15. In some of these cases, constitutional objections to the statute have been made and overruled. In other cases, it has been adjudged unconstitutional. *Stewart v. Hartman*, 46 Ind. 331; *Clack v. White*, 2 Swan, Tenn. 540; *Brewer v. Bowman*, 9 Ga. 37; *Crear v. Crossly*, 40 Ill. 175; *Nesbitt v. Trumbo*, 39 Ill. 110; *Bankhead v. Brown*, 25 Iowa, 540; *Taylor v. Porter*, 4 Hill, N. Y. 140; *Barr v. Flynn*, 20 Mo. Ap. 383. See *Sholl v. German Coal Co.* 118 Ill. 427.

⁸ *Larned v. Larned*, 11 Met. 421; *Smith v. Barnes*, 101 Mass. 275.

⁹ *Pope v. Devereux*, 5 Gray, 409.

¹⁰ *Stafford v. Coyney*, 7 B. & C. 257.

¹¹ *Vestry of Bermondsey v. Brown*, Law Rep. 1 Eq. 204; *Bailey v. Culver*, 12 Mo. Ap. 175.

It is immaterial to the rights of the parties how the way originated, though sometimes an inquiry into its origin will be helpful in determining its location and permissible uses. As to which, —

§ 870. **Location.** — The owner of a private way is permitted to pass over the servient land only on the line of its location.¹ And we saw in a preceding chapter, that an obstruction of it does not, to the same extent as of a public way, authorize the person using it to travel upon adjoining lands.²

§ 871. **Uses.** — Commonly, but not necessarily, a private way is limited to particular uses, expressed in the deed or inferable from the prescription creating it. Then the owner has no right to employ it for other uses.³ Thus, a way for all carriages is not therefore such for all cattle,⁴ and one for a specified purpose cannot be travelled for another.⁵ A footway is not a way for carriages also,⁶ but a carriage-way is likewise a footway.⁷ There are some peculiarities attaching to the —

§ 872. **Way of Necessity.** — If one conveys to another, out of a parcel of land,⁸ a part lying neither on the highway nor on the grantee's other land, it will be useless to the new owner unless he can have access to it; hence, by presumption of law, the deed carries with it to the grantee a right of way over the unconveyed part.⁹ And this rule applies as well to an equitable as to a legal conveyance,¹⁰ and it applies to land set off on execution.¹¹ But the mere fact that the grantee can reach

¹ *Smith v. Lee*, 14 Gray, 473; *Long v. Gill*, 80 Ala. 408; *Hutton v. Hamboro*, 2 Fost. & F. 218; *George v. Cox*, 114 Mass. 382; *Bannon v. Angier*, 2 Allen, 128; *Miller v. Bristol*, 12 Pick. 550.

² *Ante*, § 162.

³ *Atwater v. Bodfish*, 11 Gray, 150; *Wimbledon, &c. Conserv. v. Dixon*, 1 Ch. D. 362; *Bradburn v. Morris*, 3 Ch. D. 812; *Williams v. James*, Law Rep. 2 C. P. 577.

⁴ *Ballard v. Dyson*, 1 Taunt. 279.

⁵ *Cowling v. Higginson*, 4 M. & W. 245; *Jackson v. Stacy*, Holt, N. P. 455.

⁶ *Rowell v. Doggett*, 143 Mass. 483;

Rex v. Burgess, 2 Bur. 908; *Cousens v. Rose*, Law Rep. 12 Eq. 366.

⁷ *Davies v. Stephens*, 7 Car. & P. 570.

⁸ *Woodworth v. Raymond*, 51 Conn. 70; *Oliver v. Hook*, 47 Md. 301.

⁹ 2 Bl. Com. 36; *Howton v. Frearson*, 8 T. R. 50; *Pernam v. Wead*, 2 Mass. 203; *Stewart v. Hartman*, 46 Ind. 331; *Brigham v. Smith*, 4 Gray, 297; *Davies v. Sear*, Law Rep. 7 Eq. 427; *Kimball v. Cochecho Rld.* 7 Fost. N. H. 448; *Smyles v. Hastings*, 22 N. Y. 217.

¹⁰ *Simmons v. Sines*, 4 Abb. Ap. 246.

¹¹ *Schmidt v. Quinn*, 136 Mass. 575.

the land more shortly by passing over the grantor's other land does not create this sort of way;¹ and still the necessity need not be of the very highest sort, a reasonable necessity suffices.² There may be circumstances in which the necessity will carry two or more ways,³ but ordinarily only one, and this it is competent for the grantor to select or define.⁴ The grantee can use the way only for purposes within the reasonable contemplation of the parties at the time of its creation, not for such as subsequent changes may render desirable.⁵ When the necessity ceases,—for example, by the grantee's acquiring adjoining land over which he has a way of his own,—this right of way, founded on the necessity which no longer exists, terminates.⁶

§ 873. **Construct and Repair.** — A right of way is not simply the right to pass over the servient land, but it includes also the right to enter upon such land, put it in condition for the particular use, and keep it so.⁷ The owner of the servient land is not under obligation to do this work,⁸ unless by agreement or prescription.⁹ In building or repairing a private way, the dominant owner may use materials which he finds on its

¹ *Motes v. Bates*, 74 Ala. 374.

² *Goodall v. Godfrey*, 53 Vt. 219; *Cihak v. Klekr*, 107 Ill. 643; *Pettin-gill v. Porter*, 8 Allen, 1. See *Hall v. McLeod*, 2 Met. Ky. 98; *Hyde v. Jamaica*, 27 Vt. 443; *Lawton v. Rivers*, 2 McCord, 445; *Seabrook v. King*, 1 Nott & McC. 140; *Screven v. Gregorie*, 8 Rich. 158.

³ *Nichols v. Luce*, 24 Pick. 102.

⁴ *Bolton v. Bolton*, 11 Ch. D. 968; *Russell v. Jackson*, 2 Pick. 574, 578, where *Wilde, J.* says: "All that a person entitled to such an easement can reasonably claim, is a convenient way; and, if this is allowed by the owner of the land, he has no cause to complain. To the person entitled to the easement it is immaterial where the way is located, so that he has a convenient way; but to the owner of the land it may be exceedingly important." If the servient owner declines to make the designa-

tion, the grantee may select for himself. *Holmes v. Seely*, 19 Wend. 507; *Chase v. Perry*, 132 Mass. 582, 584.

⁵ *London v. Riggs*, 13 Ch. D. 798; *Seeley v. Bishop*, 19 Conn. 128; *Serff v. Acton Local Board*, 31 Ch. D. 679.

⁶ *Viall v. Carpenter*, 14 Gray, 126; *Holmes v. Goring*, 2 Bing. 76, 9 Moore, 166; *Baker v. Crosby*, 9 Gray, 421; *Carey v. Rae*, 58 Cal. 159; *Abbott v. Stewartstown*, 47 N. H. 228; *Wissler v. Hershey*, 11 Harris, Pa. 333.

⁷ *Senhouse v. Christian*, 1 T. R. 560; *Atkins v. Bordman*, 2 Met. 457, 467; *Gerrard v. Cooke*, 2 N. R. 109, 115; *Brown v. Stone*, 10 Gray, 61.

⁸ *Wynkoop v. Burger*, 12 Johns. 222; *Osborn v. Wise*, 7 Car. & P. 761; *Puryear v. Clements*, 53 Ga. 232.

⁹ *Rider v. Smith*, 3 T. R. 766; *Doane v. Badger*, 12 Mass. 65; *Greene v. Canny*, 137 Mass. 64.

path, but he can take nothing away; for what is not so used belongs to the servient owner.¹

§ 874. **The Servient Owner** — may use the land as he pleases, except that he must not obstruct or impair the way.² How far he may go herein will depend upon the nature of the way, in a measure upon views special to particular judges on questions as to which opinions differ, and sometimes on the terms of a statute. He may build over the way, leaving a sufficient and convenient arched passage, duly lighted.³ One obtained a right of way in an established lane “for the convenient occupation” of his adjoining farmland, and he was held to be “entitled to all the convenience which, as it then existed, it could afford in the management of the farm;” therefore the servient owner could not put a gate across the lane.⁴ But commonly the right of the servient owner to erect gates and bars, easily opened and closed, is recognized by the courts, and sometimes it is expressly provided for by statutes.⁵

§ 875. **Remedy.** — For an unauthorized obstruction of the way an action at law will lie,⁶ and in proper circumstances a bill in equity.⁷ So also the way-owner may remove unlawful obstructions.⁸ If herein, or in the use of the way, he transcends his privilege, the servient proprietor will have his

¹ Phillips v. Bowers, 7 Gray, 21; Jefcoat, 11 Rich. 529; Amondson v. Emans v. Turnbull, 2 Johns. 313. Severson, 37 Iowa, 602. See Devore v.

² Underwood v. Carney, 1 Cush. 285, Ellis, 62 Iowa, 505.
292; Blanchard v. Allen, 3 Cow. 220; Capers v. Wilson, 3 McCord, 170; Atkins v. Bordman, 2 Met. 457, 467.

³ Sutton v. Groll, 15 Stew. Ch. 213; Atkins v. Bordman, supra; Richardson v. Pond, 15 Gray, 387.

⁴ Dickinson v. Whiting, 141 Mass. 414. Compare with Brownell v. Dyer, 5 Mason, 227.

⁵ Baker v. Frick, 45 Md. 337; Bakeman v. Talbot, 31 N. Y. 366; Houpes v. Alderson, 22 Iowa, 160; McTavish v. Carroll, 17 Md. 1; Maxwell v. McAtee, 9 B. Monr. 20; Hinks v. Hinks, 46 Maine, 423; Stevens v. Allen, 5 Dutcher, 68; The State v.

⁶ 3 Bl. Com. 241; Boyden v. Achenbach, 86 N. C. 397; Steel v. Grigsby, 79 Ind. 184; Brunton v. Hall, 1 Q. B. 792; Duncan v. Louch, 6 Q. B. 904; Allen v. Ormond, 8 East, 4; Cushing v. Adams, 18 Pick. 110.

⁷ Schaidt v. Blaul, 66 Md. 141; Bean v. Coleman, 44 N. H. 539; McCann v. Day, 57 Ill. 101; Nash v. New England Mut. Life Ins. Co. 127 Mass. 91; Fox v. Pierce, 50 Mich. 500; McCue v. Ralston, 9 Grat. 430.

⁸ Webber v. Sparkes, 10 M. & W. 485; Quintard v. Bishop, 29 Conn. 366.

action,¹ to which it will be no answer that no damage was done beyond the disturbance of a right.²

§ 876. **Third Persons.** — As to third persons, the principles considered in our last chapter apply.³ One owes to trespassers no duty to keep his ways in repair; and only persons invited on a private way, or having a right to use it, can have damages for an injury suffered from its unsafe condition.⁴ But where the owner of the way expressly or by implication opens it to others, he may be responsible for injuries through defects of which he is aware; as, where it is practically public, and used by the public with his knowledge and permission.⁵

III. *Under and Upper Waters.*

§ 877. *Underground* : —

How regarded. — Only as the result of investigations necessarily imperfect do we know of the existence of underground currents of water. Mere percolations are more obvious. But all beneath the surface is so obscure that to establish a system of legal rules for easements in these natural waters underground would be practically impossible, and the facts would ordinarily be so uncertain to the owners of the soil that they could not conform to the rules if made. Moreover, if these difficulties were surmounted, still more evil than good would come from opening the courts to litigation over easements and servitudes in these invisible percolations and voiceless rills.⁶ So that —

§ 878. **Doctrine defined.** — Waters placed by nature below the surface of the ground, and beyond ordinary observation, are exempt from the rules governing those above. So long as they remain thus undisclosed, there can be no easement in them and they are subject to no servitude. The owner of the

¹ Davenport v. Lamson, 21 Pick. 177; Louisville, &c. Canal v. Murphy, 72. 9 Bush, 522.

² Appleton v. Fullerton, 1 Gray, 186; Tuttle v. Walker, 46 Maine, 280. ⁵ Campbell v. Boyd, 88 N.C. 129, 131.

³ Ante, § 845-854.

⁴ Nugent v. Wann, 1 McCrary, 438; Birnbaum v. Crowninshield, 137 Mass. 873. ⁶ And see the reasonings in the cases, prominent among which is Chasemore v. Richards, 7 H. L. Cas. 349, 5 Jur. n. s.

surface soil may at all times, while in the honest pursuit of his own interests, extract what he can, without liability to the owner of other land injured, and subject to have his supply cut off by another who likewise has occasion to draw from the same vein.¹ But when the water has once risen or been brought to the surface, it becomes subject to the rules of over-ground waters.² Thus, —

§ 879. **Wells.** — Land-owners may, on their own premises, dig wells and use the water from them to any extent they severally need, and priority of occupation gives no priority of right; so that, regardless of the order of the digging, no one can claim anything of another for having thereby made his well or his spring dry.³ In a controversy between neighboring land-owners, where the subterranean water was ample for both, an adjustment was ordered in equity whereby neither should be deprived of his supply.⁴

§ 880. **Water for Mill.** — A river which turned a mill was largely fed by percolations from lands wherein, after the mill had become ancient, a well was sunk to supply a town with water. By the pumpings from the well the water for the mill was diminished. But the mill-owner was adjudged to be without remedy.⁵ Also, —

§ 881. **Mining.** — One injured by the loss of water which a neighboring owner abstracts in mining operations can enforce from him no compensation.⁶ Again, —

§ 882. **Support.** — One has no easement in the waters under

¹ Cases cited to the next nine sections, and *Goodale v. Tuttle*, 29 N. Y. 459; *New Albany, &c. Rld. v. Peterson*, 14 Ind. 112; *Bloodgood v. Ayers*, 108 N. Y. 400; *Cole Silver Min. Co. v. Virginia, &c. Water Co.* 1 Saw. 470; *Chatfield v. Wilson*, 27 Vt. 670, 28 Vt. 49.

² *Grand Junction Canal v. Shugar*, 6 Ch. Ap. 483.

³ *Ocean Grove Camp Meeting v. Asbury Park*, 13 Stew. Ch. 447; *Chase v. Silverstone*, 62 Maine, 175; *Ellis v. Duncan*, 21 Barb. 230; *Frazier v. Brown*, 12 Ohio State, 294; *Bliss v.*

Greeley, 45 N. Y. 671; *Delhi v. Youmans*, 45 N. Y. 362; *Lybe's Appeal*, 10 Out. Pa. 626. Contra, *Smith v. Adams*, 6 Paige, 435.

⁴ *Burroughs v. Saterlee*, 67 Iowa, 396.

⁵ *Chasemore v. Richards*, 7 H. L. Cas. 349, 5 Jur. N. s. 873; s. c. in Ex. Cham. 2 H. & N. 168, 3 Jur. N. s. 984.

⁶ *Acton v. Blundell*, 12 M. & W. 324; *Ballacorkish Silver, &c. Co. v. Harrison*, Law Rep. 5 P. C. 49; *Halde- man v. Bruckhart*, 9 Wright, Pa. 514.

the land of another for the support of his own land. So that, if the latter, by draining his land, causes the soil of the former to subside, the injury is without remedy.¹

§ 883. **Malicious.** — Since a wilful injury may be actionable when a like harm inflicted in the discharge of a duty, or in the doing of a rightful thing, would not be,² one would seem to be liable who deprives another of underground waters simply to do him a wrong, with no expectation of benefit to himself.³ Yet a part of the courts, apparently looking upon the right we are considering as absolute, hold it to be within the rule⁴ that one exercising a right is not accountable for his motives.⁵ If we accept as sound in law the ethically just doctrine that equity may restrain a man from drawing a greater quantity of underground water than he needs, to the cutting off of another's supply,⁶ it results that the right is not thus absolute, and a mere malicious exercise of it, for the express purpose of injuring another, is an actionable wrong.

§ 884. **Statutes.** — A statute may be in terms which will create a liability for drawing off underground waters.⁷ So —

§ 885. **Agreement — Prescription.** — Parties may bind themselves, as to these waters, by contract.⁸ But, though prescription is a contract proved in a particular way, the special nature of this sort of thing precludes it.⁹ To illustrate: if I see a well on my neighbor's land, I have no power to interfere, and no occasion to announce any purpose as to my own land. Then, should this state of things continue during the prescription period, there can be no presumption that we bar-

¹ *Popplewell v. Hodkinson*, Law Rep. 4 Ex. 248.

² *Ante*, § 142-147.

³ *Chesley v. King*, 74 Maine, 164; *Greenleaf v. Francis*, 18 Pick. 117; *Haldeman v. Bruekhart*, 9 Wright, Pa. 514, 521; *Roath v. Driscoll*, 20 Conn. 533.

⁴ *Ante*, § 103, 503.

⁵ *Phelps v. Nowlen*, 72 N. Y. 39; *Frazier v. Brown*, 12 Ohio State, 294; *Chatfield v. Wilson*, 28 Vt. 49.

⁶ *Ante*, § 879.

⁷ *Trowbridge v. Brookline*, 144 Mass. 139.

⁸ *Johnstown Cheese Manuf. Co. v. Veghte*, 69 N. Y. 16; *Dickinson v. Grand Junction Canal*, 7 Exch. 282.

⁹ *Chasemore v. Richards*, 7 H. L. Cas. 349, 5 Jur. n. s. 873; *Roath v. Driscoll*, 20 Conn. 533; *Frazier v. Brown*, 12 Ohio State, 294; *Hanson v. McCue*, 42 Cal. 303. See *Acton v. Blundell*, 12 M. & W. 324; *Greenleaf v. Francis*, 18 Pick. 117.

gained for it, since there was nothing to call out a controversy or a compromise.

§ 886. *Fouling*. — Whether one can pollute a neighbor's underground waters to his injury, and escape liability, is a question on which there has been a difference of opinion. It is adjudged in England that he cannot, "on this ground," said Brett, M. R. "that, although nobody has any property in the percolating water, yet such water is a common source which everybody has a right to appropriate, and that therefore no one is justified in injuring the right of appropriation which everybody else has."¹ But in many circumstances, — as, where the nature and courses of the underground waters are unknown, which is the common case, — the application of this doctrine would be difficult and uncertain; so that, if it is accepted, it should be only with qualifications.²

§ 887. *Part Underground*. — If a stream flows at places above the surface and at others below, so that its course can be traced, it is not, within our doctrine, underground water.³

§ 888. *Watercourses above Ground*: —

Distinction. — The above-ground watercourses, in law language termed simply watercourses, do not follow either the rules governing underground waters, just stated, or exactly those of surface waters.

§ 889. *Term defined*. — A watercourse is the perennial or intermittent⁴ flow of waters of whatever dimension,⁵ from permanent sources, in a stream of ascertained limits, and as nature left it;⁶ whence, in legal language, the term denotes also the easements and servitudes pertaining thereto.⁷

¹ Ballard v. Tomlinson, 29 Ch. D. 115, 122, reversing 26 Ch. D. 194.

² And see Brown v. Illius, 25 Conn. 583.

³ Dickinson v. Grand Junction Canal, 7 Exch. 282, 300, 301; Wheatley v. Baugh, 1 Casey, Pa. 528; Hebron Gravel Road v. Harvey, 90 Ind. 192; Saddler v. Lee, 66 Ga. 45.

⁴ Ferris v. Wellborn, 64 Missis. 29; Kauffman v. Griesemer, 2 Casey, Pa. 407; Pyle v. Richards, 17 Neb. 180.

⁵ Gillett v. Johnson, 30 Conn. 180.

⁶ Luther v. Winnisimmet Co. 9 Cush. 171; Earl v. De Hart, 1 Beasley, 280; Jeffers v. Jeffers, 107 N. Y. 650; Parks v. Newburyport, 10 Gray, 28; Stanchfield v. Newton, 142 Mass. 110; Eulrich v. Richter, 37 Wis. 226; Barnes v. Sabron, 10 Nev. 217; Eulrich v. Richter, 41 Wis. 318; Gibbs v. Williams, 25 Kan. 214; Benson v. Chicago, &c. Rld. 78 Mo. 504.

⁷ A search in the books for definitions of this term ends in the usual result that nothing very serviceable ap-

§ 890. *Doctrine defined.* — Since nature made for these living waters their channels and caused them to flow therein, impartially distributing their beneficence upon the lands all the way from their springs to their resting-places in the lakes and the ocean, it is an impossibility as well of law as of fact that any measured portion of them should adhere to any measured portion of the soil, in a way to become the property of the man who owns the motionless ground.¹ Therefore the law follows nature; each land-owner along the stream is entitled to get out of it whatever good he can,² — as, to cause the gravitation of its waters to turn his mill,³ to divert them into

pears. Washburn, Easements, 209, says that "the most accurate and compendious" definition is by Bigelow, J., thus: "A watercourse is a stream of water, usually flowing in a definite channel, having a bed and sides or banks, and usually discharging itself into some other stream or body of water. To constitute a watercourse, the size of the stream is not important; it may be very small, and the flow of the water need not be constant. But it must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes." *Luther v. Winnisimmet Co.* supra, at p. 174. In *Jeffers v. Jeffers*, 107 N. Y. 650, 651, the court observes that "a watercourse, as defined in the law, means a living stream, with defined banks and channel, not necessarily running all the time, but fed from other and more permanent sources than mere surface water." Referring to *Barkley v. Wilcox*, 86 N. Y. 140, 143. In the latter case, Andrews, J. defines: "A natural watercourse is a natural stream flowing in a defined bed or channel, with banks and sides, having permanent sources of supply. It is not essential to constitute a watercourse that the flow should be uniform or uninterrupted." These neater definitions than Bigelow's were not published when Washburn wrote. See also *Eulrich v. Richter*, 37 Wis. 226; *Fryer v. Warne*, 29 Wis. 511. But no one of

these definitions covers the latter branch of the definition as given in my text. Abbott, Law Dict. Watercourse, quotes 1 Steph. Com. 659, 693, thus: "A watercourse is a right which a man may have to the benefit or flow of a river or stream. This right includes that of having the course of the stream kept free from any interruption or disturbance to the prejudice of the proprietor, by the acts of persons without his own territory, — whether owing to a diversion of the water, or to its obstruction, or pollution by offensive commixture." And he adds, from Whart. Law Dict.: "A watercourse is a species of incorporeal hereditament; being a right which one has to the benefit of the flow of a river or stream," &c. Unlike as these two forms of the defining seem to be, each is substantially correct; the one, covering the first part of the definition as given in my text; the other, the second.

¹ *Embrey v. Owen*, 6 Exch. 353; *Race v. Ward*, 4 Ellis & B. 702; *Barkley v. Wilcox*, 86 N. Y. 140, 146.

² *Gardner v. Newburgh*, 2 Johns. Ch. 162, 164; *McCord v. High*, 24 Iowa, 336; *Cowles v. Kidder*, 4 Fost. N. H. 364; *Pugh v. Wheeler*, 2 Dev. & Bat. 50; *Omelyan v. Jagers*, 2 Hill, S. C. 634; *Shamleffer v. Council Grove, &c.* Mill, 18 Kan. 24; *Ford v. Whitlock*, 27 Vt. 265; *Johnson v. Jordan*, 2 Met. 234, 239.

³ *Springfield v. Harris*, 4 Allen, 494;

temporary pauses within artificial embankments for ornament or use,¹ to conduct them through his grounds in fructifying rills, which if not exhausted he returns to the natural channel when their work is done,²—but not in a way or to an extent to deprive a lower owner of his equal rights,³ while yet the doctrine of equal rights itself permits a reasonable diminution of the stream to the disadvantage of such lower owner.⁴ The correlate rights of the parties herein constitute easements on the one side and servitudes on the other, originating in nature and adopted by the law.⁵

§ 891. **Bargainings and Prescription.**—The rights of parties in these waters may be regulated by agreements between them;⁶ hence, therefore, by prescription.⁷ But to some extent they are within the practical difficulties which prevent prescription in underground waters.⁸ For example, one who employs the power of a stream to turn his mill does nothing adverse to the owner of an unoccupied mill-site above,⁹ or of lands which may thereafter require irrigation;¹⁰ so that no length of user of the mill can prevent the exercise at any time of these dormant mill and irrigating privileges. In the words

Bliss v. Kennedy, 43 Ill. 67; *Burden v. Mobile*, 21 Ala. 309; *Plumleigh v. Dawson*, 1 Gilman, 544; *Thurber v. Martin*, 2 Gray, 394; *Gould v. Boston Duck Co.* 13 Gray, 442; *Clinton v. Myers*, 46 N. Y. 511.

¹ *Norbury v. Kitchin*, 9 Jur. n. s. 132.

² *Anthony v. Lapham*, 5 Pick. 175; *Messinger's Appeal*, 13 Out. Pa. 285; *Weiss v. Oregon Iron, &c. Co.* 13 Oregon, 496; *Sampson v. Hoddinott*, 1 C. B. n. s. 590, 3 Jur. n. s. 243.

³ *Embrey v. Owen*, supra; *Cook v. Hull*, 3 Pick. 269; *Arnold v. Foot*, 12 Wend. 329; *Colburn v. Richards*, 13 Mass. 420; *Wadsworth v. Tillotson*, 15 Conn. 366; *Blanchard v. Baker*, 8 Greenl. 253; *Davis v. Getchell*, 50 Maine, 602; *Bliss v. Kennedy*, 43 Ill. 67; *Baker v. Brown*, 55 Texas, 377; *Moulton v. Newburyport Water Co.* 137 Mass. 163; *Pennsylvania Rld. v. Miller*, 2 Am. Pa. 34.

⁴ *Weston v. Alden*, 8 Mass. 136, as to which, see *Cook v. Hull*, supra; *Colrick v. Swinburne*, 105 N. Y. 503; *Clinton v. Myers*, 46 N. Y. 511.

⁵ And see *Cary v. Daniels*, 8 Met. 466, 480; *Crittenton v. Alger*, 11 Met. 281; *Dickinson v. Grand Junc. Canal*, 7 Exch. 282, 299; *Farris v. Dudley*, 78 Ala. 124; *Brakely v. Sharp*, 2 Stock. 206.

⁶ *Ortman v. Dixon*, 13 Cal. 33; *Goodrich v. Burbank*, 12 Allen, 459; *Mandeville v. Comstock*, 9 Mich. 536; *Le Fevre v. Le Fevre*, 4 S. & R. 241; *Clark v. Close*, 43 Iowa, 92.

⁷ *Mason v. Hill*, 5 B. & Ad. 1; *Watkins v. Peck*, 13 N. H. 360; *Jennison v. Walker*, 11 Gray, 423; *Ivimey v. Stocker*, Law Rep. 1 Ch. Ap. 396.

⁸ Ante, § 885.

⁹ *Thurber v. Martin*, 2 Gray, 394.

¹⁰ *Embrey v. Owen*, 6 Exch. 353; *Broadbent v. Ramsbotham*, 11 Exch. 602.

of Shaw, C. J. "it must be some use inconsistent with and therefore adverse to the right of others, which can be acquired by prescription; such as diverting the water from its natural course."¹ Thus, —

§ 892. **Diverting Water.** — As intimated by this learned judge, one has no right, except as stated in a preceding section,² to divert a stream from its natural channel to the injury of a lower owner. If he does it, an action will immediately lie against him,³ for he is exercising what he claims as his right, adversely to such owner's right.⁴ Within this doctrine, one who during the prescription period has taken water for irrigation without objection from those below him, cannot be called to account by them for afterward withdrawing more than his just proportion, if he continues simply to use what he has done before.⁵ So, —

§ 893. **Flowing.** — If one so dams a stream that it overflows lands above his own, or injures a mill there, he does an act adverse to the rights of their owner, for which an action will at once lie.⁶ Then, by continuing this uninterruptedly during the prescription period, he acquires the right from the law's presumption of a grant.⁷ Again, —

§ 894. **Pollution.** — One has no right to pollute a stream to the injury of a riparian proprietor.⁸ But, within limits perhaps, this right may be acquired by prescription.⁹ The same may be said of an —

¹ Gould v. Boston Duck Co. 13 Gray, 442, 451.

² Ante, § 890.

³ Mason v. Hill, 3 B. & Ad. 304; Tuthill v. Scott, 43 Vt. 525; Porter v. Durham, 74 N. C. 767; Williamson v. Look's Creek Canal, 78 N. C. 156; Garwood v. New York Cent. &c. Rld. 83 N. Y. 400.

⁴ Polly v. McCall, 37 Ala. 20; Haight v. Price, 21 N. Y. 241; Smith v. Adams, 6 Paige, 435; Pillsbury v. Moore, 44 Maine, 154; Campbell v. Smith, 3 Halst. 140; Beeston v. Weate, 5 Ellis & B. 986.

⁵ Messinger's Appeal, 18 Out. Pa. 285.

⁶ Brown v. Bowen, 30 N. Y. 519.

⁷ Cowell v. Thayer, 5 Met. 253, 256; Baldwin v. Calkins, 10 Wend. 166.

⁸ Goldsmid v. Tunbridge Wells Imp. Com. Law Rep. 1 Ch. Ap. 349; Attorney-General v. Guardians of Poor, 20 Ch. D. 595; Hill v. Smith, 32 Cal. 166; Carhart v. Auburn Gas-light Co. 22 Barb. 297; Lockwood Co. v. Lawrence, 77 Maine, 297; Jackman v. Arlington Mills, 137 Mass. 277.

⁹ Crossley v. Lightowler, Law Rep. 2 Ch. Ap. 478; Fletcher v. Bealey, 28 Ch. D. 688. And see Cotton v. Pocasset Manuf. Co. 13 Met. 429; White v. Chapin, 12 Allen, 516.

§ 895. **Increased Flow.** — To increase the flow of a watercourse by turning into it other water, to the injury of a riparian owner, is an actionable wrong.¹ It therefore follows that the wrong may be converted into a right by prescription.

§ 896. **Statutes,** — in some of the States, more or less vary the foregoing rules of the common law. But, as each practitioner will have before him the legislation of his own State and the decisions thereon, nothing further need be particularized here.²

§ 897. *Surface Water* : —

Judicial Differences. — There are two opinions on this subject, widely antagonistic; namely, —

§ 898. **Filling Depressions in Land.** — By the opinion which, it is submitted, is the better founded both in legal reason and in public policy, one may fill up with soil the pools and the other depressions in his land to any extent required for its good management, not to the obstructing of a watercourse within the expositions just made,³ but to the turning back, upon another's adjoining lands, of surface water thence flowing. This results from the right of every man to use his own property as he will, though incidentally to the injury of another, if he does not interfere with the other's fixed and absolute rights, and sometimes if he does.⁴ And surface water is a thing too unstable and shifting to be the subject of a fixed and absolute right.⁵ When, therefore, one owning land on a lower grade than his neighbor's, so that the latter's surface water was accustomed to flow over it, filled it up and built a

¹ *Stanchfield v. Newton*, 142 Mass. 110; *Tillotson v. Smith*, 32 N. H. 90; *Crawford v. Rambo*, 44 Ohio State, 279.

² *Lux v. Haggin*, 69 Cal. 255; *Charnock v. Rose*, 70 Cal. 189; *Edgar v. Stevenson*, 70 Cal. 286; *Barnes v. Marshall*, 68 Cal. 569; *Moore v. Clear Lake Waterworks*, 68 Cal. 146; *Howes v. Grush*, 131 Mass. 207; *Head v. Amoskeag Manuf. Co.* 113 U. S. 9; *Kaler v. Campbell*, 13 Oregon, 596; *Hamlin v. Pairpoint Manf. Co.* 141 Mass. 51; *Blackwell v. Phinney*, 126 Mass. 458; *Ramsdale v. Foote*, 55 Wis. 557.

³ Ante, § 892.

⁴ Ante, § 102-107.

⁵ *Hoyt v. Hudson*, 27 Wis. 656; *Moyer v. New York Cent. &c. Rld.* 88 N. Y. 351; *Bangor v. Lansil*, 51 Maine, 521; *Gerrish v. Union Wharf*, 26 Maine, 384; *Benthall v. Seifert*, 77 Ind. 302; *O'Connor v. Fond du Lac, &c. Ry.* 52 Wis. 526; *Kansas City, &c. Rld. v. Riley*, 33 Kan. 374; *Hanlin v. Chicago, &c. Ry.* 61 Wis. 515; *Lessard v. Stram*, 62 Wis. 112; *Hill v. Cincinnati, &c. Ry.* 109 Ind. 511.

house upon it, casting back this surface water to the other's injury, he was held not to be liable for the damages.¹ On the other hand, the contrary of this is held by a part of the courts.² It is obvious that to compel a land-owner to make his property a perpetual cesspool for his neighbor would not be promotive of improvements in the general condition of the lands of the country; nor is the refusal of it so great an injury to the upper owner as its doing would be to the lower. Still, consistently with this view, —

§ 899. **Surface Flowage in Nature of Watercourse.** — In some cases, where nature has given to the surface of the ground a form very special, there may be wanting the channel essential

¹ *Barkley v. Wilcox*, 86 N. Y. 140.

² *Boyd v. Conklin*, 54 Mich. 583; *Nininger v. Norwood*, 72 Ala. 277; *Farris v. Dudley*, 78 Ala. 124; *Tootle v. Clifton*, 22 Ohio State, 247; *Eaton v. Boston, &c. Rld.* 51 N. H. 504; *Toledo, &c. Ry. v. Morrison*, 71 Ill. 616; *Raleigh, &c. Rld. v. Wicker*, 74 N. C. 220. In *Barkley v. Wilcox*, supra, Andrews, J. discusses this question very lucidly. He says that the latter of the two conflicting propositions of the text is derived from the civil law. By this law, to quote his words, "the lower proprietor is bound to receive the waters which naturally flow from the estate above, provided the industry of man has not created or increased the servitude. The courts of Pennsylvania, Illinois, California, and Louisiana have adopted this rule, and it has been referred to with approval by the courts of Ohio and Missouri [citing *Martin v. Riddle*, 2 Casey, Pa. 415, note; *Kauffman v. Griesemer*, 2 Casey, Pa. 407; *Gillham v. Madison Rld.* 49 Ill. 484; *Gormley v. Sanford*, 52 Ill. 158; *Ogburn v. Connor*, 46 Cal. 346; *Delahoussaye v. Judice*, 13 La. An. 587; *Hays v. Hays*, 19 La. 351; *Butler v. Peck*, 16 Ohio State, 334; *Laumier v. Francis*, 23 Mo. 181]. On the other hand, the courts of Massachusetts, New Jersey, New Hampshire, and Wisconsin have rejected the doctrine of the civil law,

and hold that the relation of dominant and servient tenements does not by the common law apply between adjoining lands of different owners so as to give the upper proprietor the legal right, as an incident of his estate, to have the surface water falling on his land discharged over the land of the lower proprietor, although it naturally finds its way there; and that the lower proprietor may lawfully, for the improvement of his estate and in the course of good husbandry, or to make erections thereon, fill up the low places on his land, although by so doing he obstructs or prevents the surface water from passing thereon from the premises above, to the injury of the upper proprietor [citing *Luther v. Winnisimmet Co.* 9 Cush. 171; *Parks v. Newburyport*, 10 Gray, 28; *Dickinson v. Worcester*, 7 Allen, 19; *Gannon v. Hargadon*, 10 Allen, 106; *Bowlsby v. Spear*, 2 Vroom, 351; *Pettigrew v. Evansville*, 25 Wis. 223; *Hoyt v. Hudson*, 27 Wis. 656; *Swett v. Cutts*, 50 N. H. 439]. It may be observed that in Pennsylvania house lots in towns and cities seem to be regarded as not subject to the rule declared in the other cases in that State, in respect to surface drainage," referring to *Bentz v. Armstrong*, 8 Watts & S. 40. He also cites *Livingston v. McDonald*, 21 Iowa, 160, as containing a *dictum* contrary to the civil-law rule.

to a technical watercourse, while yet the arresting of the surface flow would produce a devastating inundation behind. In reason, therefore, the rule in watercourses¹ should apply in such a case, to the extent of compelling the lower owner to permit some egress for what is technically surface water.² And —

§ 900. **Malicious.** — It would accord with the language of the cases, and with what we have seen to be sound in reason,³ to hold the owner of the lower land liable for the damages if, purely to injure the upper owner, and not to benefit his own estate, he thus maliciously raised its surface.

§ 901. **Upper Owner.** — The upper owner is under no duty to the lower to prevent his surface water from continuing its natural flow upon the latter's land; he is not required to keep it on his own.⁴ But he will commit an actionable wrong if he does or leaves undone⁵ anything whereby surface or other water is cast upon the lower owner's land, to its special injury, contrary to its natural flow; as, by increased discharges of the surface water from artificial ditches.⁶ And still ditches are permissible when constructed with a prudent regard to the interests of the lower owner, and without changing the direction of the flow, or otherwise injuring him.⁷ But one cannot, in a wider sense, make his neighbor's lower land drainage-ground for his own.⁸

§ 902. **Draining into Watercourse.** — One may drain his grounds into any accessible watercourse. Some hold this right to be absolute, so that it may be exercised though riparian owners are thereby injured; but, by another view, the

¹ Ante, § 892, 893.

² And see and compare with the text *Palmer v. Waddell*, 22 Kan. 352; *Kelly v. Dunning*, 12 Stew. Ch. 482.

³ Ante, § 883.

⁴ *Vanderwiele v. Taylor*, 65 N. Y. 341; *Doerbaum v. Fischer*, 1 Mo. Ap. 149.

⁵ *Tenant v. Golding*, 1 Salk. 21; s. c. nom. *Tenant v. Goldwin*, 2 Ld. Raym. 1089; *Hoare v. Dickinson*, 2 Ld. Raym. 1568.

⁶ *Benson v. Chicago, &c. Rld.* 78 Mo. 504; *Hogenson v. St. Paul, &c. Ry.* 31 Minn. 224; *Kelly v. Dunning*, 12 Stew. Ch. 482; *Knight v. Brown*, 25 W. Va. 808.

⁷ *Hughes v. Anderson*, 68 Ala. 280; *Hoester v. Hemsath*, 16 Mo. Ap. 485. And see *Crabtree v. Baker*, 75 Ala. 91.

⁸ *Herrington v. Peck*, 11 Bradw. 62; *Butler v. Peck*, 16 Ohio State, 334.

stream must not be so increased beyond its natural capacity as to overflow such owners.¹

§ 903. **Contract—Prescription.**—Surface water may be a subject of adjustment by contract;² but, under principles above considered,³ it is not always within the sphere of prescription.⁴ A reference to these principles will enable one readily to determine how it is in a particular instance.

IV. *Partitions and Supports.*

§ 904. **What for this Sub-title.**—It is not proposed to enter minutely into this subject, but briefly to state the doctrines, which are not complicated, thus,—

§ 905. *Lateral Support* :—

Natural Lands.—When lands of two owners lie side by side as left by nature, with nothing placed or built upon them, the land of each is both dominant and servient to the other's, so far that neither shall make in his own any excavation so near the other's and so deep as to cause a crumbling and falling in. And the one who does it must recompense the other for his damages. This rule is derived by the law, like that for water-courses,⁵ not from contract or prescription, but from natural equity.⁶ But,—

§ 906. **Buildings and Things on Land.**—If an owner brings upon his land anything which, by its weight, renders necessary a greater lateral support, he takes upon himself the responsibility for the consequences. The common case is where he erects upon it a house or other building; he may still claim support for his land considered as in its natural condition,

¹ *Waffle v. New York Cent. Rld.* 53 N. Y. 11; *Jackman v. Arlington Mills*, 137 Mass. 277; *Cairo, &c. Rld. v. Stevens*, 73 Ind. 278; *Peck v. Herrington*, 109 Ill. 611.

² *Curtiss v. Ayrault*, 47 N. Y. 73.

³ Ante, § 885, 891.

⁴ *Swett v. Cutts*, 50 N. H. 439; *Parks v. Newburyport*, 10 Gray, 28. And see *Tootle v. Clifton*, 22 Ohio State, 247.

⁵ Ante, § 890.

⁶ *Gilmore v. Driscoll*, 122 Mass. 199; *Transportation Co. v. Chicago*, 99 U. S. 635, 645; *Farrand v. Marshall*, 21 Barb. 409; *Oneil v. Harkins*, 8 Bush, 650; *Mamer v. Lussem*, 65 Ill. 484, 489; *Dyer v. St. Paul*, 27 Minn. 457; *Busby v. Holthaus*, 46 Mo. 161; *Humphries v. Brogden*, 12 Q. B. 739.

but not for the structure thereon. So that, if the adjacent owner with due care digs away his own ground, and the building is weakened or falls through a crumbling of the soil which in its natural state would not have occurred, the owner of the structure is absolutely without remedy. If, in the absence of the erection, the falling away of the soil would have taken place, the owner of the building may still have compensation for the injury to the land; but not, by the American doctrine, for that to the building;¹ by the English doctrine, for the injury to the building also.² Thus, to state a case widely followed by our American courts, where one built on his own land a house upon a hill, with a cellar wall two feet from lands of another, and twelve years afterward the latter cut down his part of the hill so near this house that the crumbling of the earth laid the cellar wall bare and endangered the structure thereon, compelling its occupant to abandon it and take it away, compensation was by the court allowed for the damage to the soil, but not to the building.³ Further as to which, —

§ 907. **English and American Doctrines, compared.** — It is a great advantage to our American law that the ante-revolutionary holdings of the English courts are not absolutely binding on ours, but only so far as they are adapted to our somewhat different situation and needs. By thus qualifying their effect with us, our tribunals have removed the principal obstacle to correcting, by the reasonings of the law,⁴ old errors committed by the English judges. Of course, while we respect the later English decisions, we do not accord to them the weight of authority; so that we have the benefit of their wisdom, without being required to follow any accompanying shadows of the contrary sort. Unhappily, our judges have

¹ *Oneil v. Harkins*, 8 Bush, 650; *Guire v. Grant*, 1 Dutcher, 356; *Beard Gilmore v. Driscoll*, 122 Mass. 199; *v. Murphy*, 37 Vt. 99; *Richart v. Scott*, Transportation Co. v. Chicago, 99 U. S. 7 Watts, 460.

635, 645; *Morrison v. Bucksport, &c.* ² *Hunt v. Peake*, Johns. Ch. Eng. 705, 6 Jur. N. S. 1071; *Brown v. Robins*, 4 H. & N. 186; *Gray, C. J.* in *Gilmore v. Driscoll*, supra, at p. 206.

Wyatt v. Harrison, 3 B. & Ad. 871; ³ *Thurston v. Hancock*, 12 Mass. *Moody v. McClelland*, 39 Ala. 45; 220.

Runnels v. Bullen, 2 N. H. 532; *Mc-* ⁴ Ante, § 81, 88.

not availed themselves of these advantages to their full extent; their reverence has been too profound, so they have made many inaccurate rulings simply because they were English. Still, on the other hand, they have rejected many English shadows; and, on the whole, rendered the common law in this country more enlightened than it is in England. As to the particular difference stated in the last section, the question appears not to have arisen in the English courts until long after the leading American case was decided. And, contrary to the ordinary course in such things, our tribunals reached the conclusion which is evidently wrong, while the English solution is right. Thus, referring to the facts in the leading American case, the man who built his house on the hill within two feet of his neighbor's line, exercised an unquestionable legal right, and he did his neighbor no wrong. If the weight of the house increased the danger of a caving in when the supporting soil was removed, he took upon himself a risk such as builders of houses do in the majority of instances in our thickly settled villages and cities. And still it is the right of every owner to extend his foundations to the very verge of his land whenever he can do so without disturbing his neighbor's soil.¹ Where, as in a few localities, the underlying substance is, instead of earth, a rock which can be easily cut and which hardens on exposure to the atmosphere, this sort of thing may be done with practical as well as legal safety. Now, in this leading American case, while the man taking away his earth kept so far from the line that the other's soil in its natural condition would not fall, he was doing no wrong; and if, at this stage of the work, the house had come down by reason of the extra pressure upon the soil, the party making the excavation would have incurred no liability under either the English or the American law, even for the damage to the ground. But when the excavator went further, and caused his neighbor's ground to give way by the operation of causes considered separately from the building, he did him a wrong; the wrong was of a sort not participated in by the owner of the building, in respect

¹ Winn v. Abeles, 35 Kan. 85; Partridge v. Scott, 3 M. & W. 220, 1 H. & H. 31.

either of the building or of the soil; the building had rightly become parcel of the realty, and the law no longer looked upon it, or upon any part of it, otherwise than as land.¹ When, therefore, the party carrying on the excavation took away the support which the law required him to maintain, he inflicted a wrong upon one who was just as much in the right in respect of the building as of the ground; and not in the entire reasonings of the common law can a particle of anything be found to justify the distinguishing of the building from the ground, so as to hold the wrong-doer responsible for the effect of his wrong on the one and not on the other. If it is replied that, even on this view, the structure increased the value of the land, and consequently the degree of the wrong-doer's responsibility, the answer is, that so did all the other buildings in the town, which made the land worth more than it was as nature left it. The law's rule is that, when one does a wrongful act to the injury of another, he must pay the damages,² estimated at the market value of the thing destroyed, which, if a manufacture, is greater than when nature left it. Unquestionably, had the American court this sort of exposition before it when in the leading case it made its decision, it would not have committed the mistake; nor, under like circumstances, would other courts have adopted the incorrect holding. And thus we are conducted to a further view; namely, —

§ 908. **Judicial Oversights — Jurist Writings — Codification.** — When, under our common-law system, a judicial question arises, it is first argued before the court by counsel, and then the judges decide it. Of necessity, in consequence of the immense amount of business before our tribunals, the process of decision proceeds largely, though not exclusively, on a comparison of the arguments of counsel, in connection with lookings into such authorities as they cite. And theoretically nothing can be more admirable. Practically it is the best thing possible, but it is a great way from being admirable. The counsel are such lawyers as the parties have chosen or been compelled by their poverty to employ. They are a little

¹ Ante, § 813, 814, 818.

² Ante, § 132, 178.

above the average; scarcely one of them has the slightest doubt that all things in the universe are seen by him, and that what his eyes do not discern does not exist. The judges are such lawyers as we have, commonly selected from those who have made more than the average reputation at the bar. The consequence is, that only a small minority of the cases are argued in a way to present to the tribunal in absolute fulness and accuracy the real questions in dispute, and especially to develop the various reasonings upon them presumably permissible by the law. In a large proportion, the law's true reasoning, and in many of them the pertinent precedents in the books, are quite overlooked. The judges, necessarily but half enlightened, and otherwise imperfect, decide a case. When the same question next arises, if counsel have before their minds views which were not present to counsel or the court in the case thus disposed of, they are told that the matter has become *res judicata*; and the judges deem it to be their duty to stop their ears and seal up the arguing lips.¹ If, as occasionally it happens, the writer of a law book dips into the reasonings of the law and brings up before his readers something which had escaped the judicial sight, a part of the profession both on and off the bench denounce him as a wicked disturber of the legal peace, who ought to be crucified for thinking and speaking of what his superiors had overlooked. In England, it is by a part of the profession deemed wicked even to cite to a court the writings of any man whom the destroyer Death has not smitten. In the United States, more liberty of right doing is accorded, but we are a great way from where we should be. We need writers on the law,

¹ I am stating the case as, nine times out of ten, it is practically found to be. We are all familiar with the common rule, that in a judicial decision nothing on which the judicial mind did not pass, is precedent. Plainly, within this rule, if the law's true reasoning was absent from the minds of the judges when they gave an opinion, their act has not become *res judicata* for the future, *as against such reasoning*. But,

as a practical question, it is only now and then that the most skilful advocate can make this view of the matter available. "This question has already been settled," says the chief justice. "But," replies the advocate, "I wish to present a view not previously before the court." To this it is answered that the pleadings in the former case cover the present question. And the overworked tribunal declines to look further.

of a different sort from the majority of those who have gone before, such as may be properly termed jurists. Those whom we thus need, if they ever come, will, instead of serving as mere echoes of the judges, and thieves of the works of their predecessors, compare the particulars of legal doctrine with the entire law and the entire law with the particulars, and the whole and each particle with the fundamental right out of which the entire law and the particulars have purported to spring, and by their manipulations produce harmony and light to the subversion of discords and darkness. When the practising profession has learned properly to use their works instead of simply citing to the courts the cases which they cite, so that the arguments *en banc* will consist of the true reasonings of the law, the judges, whatever may be their inclinations, and whatever they may protest in advance, *will follow them*. And this comes inevitably from the fact that they are human beings, created with understandings which, however reluctant to open to an unwelcome call, are, when once opened by a sufficient pressure of duty and responsibility, incapable of resisting just and accurate reasonings. And yet the mass of our judges will be only too ready to accept this help in the discharge of duties the responsibility whereof they justly feel. The cry for codification, so widely heard, is the despairing call of those who see the need, but not the true method for satisfying it. To reduce to a code the judicial blunders of ages,¹ and set the judges to interpreting crude statutes² instead of evolving the incomparable reasonings of the common law, is to conduct our jurisprudence and the nation itself far away toward the night. Returning now to our subject, —

§ 909. **Nature of Injury to Support.** — One who digs away his own soil, so as to weaken the support to which the adjacent land is entitled, commits no wrong actionable at the common law until such land has felt the effect; for, until then, its owner has not suffered³ a damage.⁴ Yet in circum-

¹ Ante, § 85, 88, 108, 280, note, 525, 537 and note, 582, 722, 769, 839, note, 843, note.

² Ante, § 689 and note, 690.

³ Ante, § 22 et seq., 417.

⁴ *Smith v. Thackerah*, Law Rep. 1 C. P. 564; *Bonomi v. Backhouse*, Ellis, B. & E. 622; s. c. in H. of L. non.

stances justifying the interference of a court of equity,¹ one whose lateral support is being dangerously interfered with by the work of another may have an injunction; or, may have it if the other refuses to take suitable precautions.²

§ 910. **Precautions — Negligence.** — Though one has the right to dig away his own soil to the endangering of another's adjacent building, under the limitations already explained, still the exercise of this right is subject to the same rule as that of every other; it must be done carefully, in a way not needlessly to injure an innocent third person.³ When, therefore, the owner of the land makes an excavation thereon, if by his careless manner of doing it he causes damage to an adjoining building, he is responsible.⁴ In prudence, and in some circumstances by legal duty, when about to make the excavation he should notify the endangered party, thus furnishing the opportunity for precautions on his part.⁵

§ 911. **Contract.** — The mutual rights and obligations we are considering are not unfrequently regulated by contract between the parties.⁶ And it may be done in any of the many forms of words effectual under the general law of contracts. Thus, where a grantor reserved in his deed the right to enter at will on a specified part of the premises, and take away the

Backhouse v. Bonomi, 9 H. L. Cas. 503, 7 Jur. N. S. 809.

¹ *Ante*, § 417; *Tunstall v. Christian*, 80 Va. 1.

² *Wier's Appeal*, 32 Smith, Pa. 203; *Morrison v. Latimer*, 51 Ga. 519. And see *Lasala v. Holbrook*, 4 Paige, 169; *McMaugh v. Burke*, 12 R. I. 499.

³ *Ante*, § 14, 98, 100, 104, 115, 150, 164, 179, 436.

⁴ *Quincy v. Jones*, 76 Ill. 231; *Baltimore, &c. Rld. v. Reaney*, 42 Md. 117; *Moody v. McClelland*, 39 Ala. 45; *Charless v. Rankin*, 22 Mo. 566; *Panton v. Holland*, 17 Johns. 92.

⁵ *Shrieve v. Stokes*, 8 B. Monr. 453; *Winn v. Abeles*, 35 Kan. 85, 92. See *Peyton v. London*, 9 B. & C. 725; *Massey v. Goyder*, 4 Car. & P. 161. In *Dorrity v. Rapp*, 72 N. Y. 307, 309, 310, *Andrews, J.* stated the common-

law rule as follows: "The owner of land, in making an excavation on his own premises which may endanger a building on his neighbor's land, is bound to use reasonable care in the prosecution of the work, and is liable for injuries to his neighbor's property resulting from his negligence." Referring to *Panton v. Holland*, *supra*; *Dodd v. Holme*, 1 A. & E. 493; *Foley v. Wyeth*, 2 Allen, 131. "But he is under no obligation to shore up his neighbor's house, nor is there any duty arising from contiguity merely that he should give his neighbor notice of his intention to excavate on his own premises. Referring to *Washb. Easm.* 444; *Trower v. Chadwick*, 3 Bing. N. C. 334, 6 Bing. N. C. 1.

⁶ *Quincy v. Jones*, 76 Ill. 231; *Rowbotham v. Wilson*, 8 Ellis & B. 123, 8 H. L. Cas. 348, 6 Jur. N. S. 965.

clay and sand for brick-making, the majority of the court held that thereby the grantee was cut off from claiming lateral support for the other part.¹ So there may be sales of lands to different persons, in such manner and terms as by implication to deprive the several grantees of any mutual rights of lateral support.² Or, if one builds houses in a block, each house deriving from and giving to another something, then conveys them severally to different purchasers, the common law's rule for lateral support yields to the reasonable presumption that each house is to support and be supported by the others.³ Hence, —

§ 912. **Prescription.** — Since prescription is a contract proved by acquiescence and lapse of time, it may vary or abrogate or enlarge the common law's rule of lateral support. We have seen⁴ what are the elements of prescription. One does an act which would subject him to the suit of another unless consented to. Then, if there is no suit, compensation paid, or anything else of the sort, and the period for prescription has elapsed, the law will presume that the parties entered into a contract, and it will give effect to the right assumed, as though such contract were established in the usual way. Now, we have multitudes of cases, English and American, in which it is taken for granted that, if one's building has stood unmolested during the prescription period, the adjacent owner has lost the above described right of excavating his own ground in a way to endanger it.⁵ This view has not passed wholly unchallenged.⁶ And no argument would seem to be

¹ *Ryckman v. Gillis*, 57 N. Y. 68. Compare with *Harris v. Ryding*, 5 M. & W. 60.

² *Rigby v. Bennett*, 21 Ch. D. 559.

³ *Richards v. Rose*, 9 Exch. 218.

⁴ *Ante*, § 885, 891–893.

⁵ For example, *Wyatt v. Harrison*, 3 B. & Ad. 871, 875; *Thurston v. Hancock*, 12 Mass. 220, 224, 225; *Lasala v. Holbrook*, 4 Paige, 169; *Mamer v. Lusem*, 65 Ill. 484.

⁶ *Gilmore v. Driscoll*, 122 Mass. 199, 207; *Napier v. Bulwinkle*, 5 Rich. 311, 324. In the former of these cases, Gray,

C. J. said: "It is difficult to see how the owner of a house can acquire by prescription a right to have it supported by the adjoining land, inasmuch as he does nothing upon, and has no use of, that land, which can be seen or known or interrupted or sued for by the owner thereof, and therefore no assent of the latter can be presumed to the acquirement of any right in his land by the former. The English cases are founded on an analogy to the doctrine of ancient lights, which is not in force in this country." And he cites *Hide v. Thorn-*

required to show that it is incorrect, and that it should be discarded. If one erects a building close beside my land, he has done me no legal wrong; I cannot tear it down, I cannot sue him. If, in the reasonable use of my land, I have occasion to sink a foundation below his, I may do it under the limitations already explained. If to-day I abstain from the doing, I do not thereby promise not to do it to-morrow. If I forbear to sue my neighbor, it is because the law gives me no right of action. If I permit his building to stand unmolested, it is because I do not wish to break the laws, and subject myself to their penalties. There is here not so much as a shadow on which prescription can stand. And this leads us to the question of —

§ 913. *Malice.* — The law does not permit one man wilfully to injure another.¹ And the proposition, sometimes assumed, that to excavate one's soil merely from malice to the adjoining owner will be actionable if he is injured, even in those cases wherein it would be lawful if done in the honest use of the land excavated,² is plainly sound in legal doctrine.³

§ 914. *Party-walls* : —

Defined. — A party-wall is the division wall between two connected and mutually supporting buildings, either both actually erected or one only contemplated, of different owners, commonly but not necessarily standing half on the land of each, ordinarily maintained at mutual cost, and always with the right of each owner to insert therein his timbers.⁴ Hence, —

borough, 2 Car. & K. 250, 255; *Stan-
sell v. Jollard*, cited 2 Car. & K. 254,
Solomon v. Vintners Co. 4 H. & N.
585, 599, 602; *Chasemore v. Richards*,
7 H. L. Cas. 349, 385, 386; *Greenleaf
v. Francis*, 18 Pick. 117, 122; *Keats v.
Hugo*, 115 Mass. 204, 215; *Richart v.
Scott*, 7 Watts, 460, 462; *Napier v.
Bulwinkle*, supra.

¹ Ante, § 16, 143.

² *Panton v. Holland*, 17 Johns. 92.

³ And see ante, § 883, 900.

⁴ I do not find in the books any very helpful definitions. *Bouvier, Law*

Dict. referring to *Bouv. Inst.*, defines it as "a wall erected on the line between two adjoining estates, belonging to different persons, for the use of both estates." *Washburn, Easms.* 455, instead of himself defining, quotes largely from the opinions in *Fettretch v. Leamy*, 9 Bosw. 510, 525. The extract contains this definition: "A dividing wall between two houses, to be used equally for all the purposes of an exterior wall by both parties; that is, by the respective owners of both houses." *Kent*, 3 Com. 437, assumes the term to be un-

§ 915. **Origin.**—Because it is a thing existing contrary to the common-law rules of lateral support, just explained, the common law knows nothing of it. Its sources are three,—an express or implied contract between the parties, prescription which is a particular form of the implied contract, a statute or municipal by-law.¹

§ 916. **By Contract.**—When it is by a contract, the contracting terms, as judicially interpreted, determine the rights of the parties.² A common case is where one on his own land erects buildings in a block, with partition walls, then sells

derstood by his readers, but does not define it. *Peck, J. in Hieatt v. Morris*, 10 Ohio State, 523, 526, fails in part, thus: "Strictly speaking, a party-wall is one built or supposed to have been built at joint expense and upon ground owned in common, so that each adjoining proprietor has an undivided interest in every part of the wall and the ground on which it stands." Certainly, in the ordinary case, the party-wall is not built on land owned by the parties in common, though it may be. Oftenest it is put half on each side of the division line of two estates, each of which is held in severalty; sometimes, entirely on the land of one. And, in either case, the wall itself may be owned in common. And see *Ingals v. Plamondon*, 75 Ill. 118. In *Watson v. Gray*, 14 Ch. D. 192, 194, *Fry, J.* puts the defining a little differently. He says that the words "party-wall" express "a meaning rather popular than legal," namely, "first, a wall of which the two adjoining owners are tenants in common, as in *Wiltshire v. Sidford*, 1 Man. & R. 404, and *Cubitt v. Porter*, 8 B. & C. 257. I think that the judgments in those cases show that that is the most common and the primary meaning of the term. In the next place, the term may be used to signify a wall divided longitudinally into two strips, one belonging to each of the neighboring owners, as in *Matts v. Hawkins*, 5 Taunt. 20. Then, thirdly, the term may mean a

wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements. . . . Lastly, the term may designate a wall divided longitudinally into two moieties, each moiety being subject to a cross easement in favor of the owner of the other moiety." Consult also *Wickersham v. Orr*, 9 Iowa, 253; *Campbell v. Mesier*, 4 Johns. Ch. 334; *Phillips v. Bordman*, 4 Allen, 147; *Brown v. Werner*, 40 Md. 15; *Weston v. Arnold*, Law Rep. 8 Ch. Ap. 1084; *Nash v. Kemp*, 49 How. Pr. 522; *Western Nat. Bank's Appeal*, 6 Out. Pa. 171.

¹ *List v. Hornbrook*, 2 W. Va. 340; *Hunt v. Ambruster*, 2 C. E. Green, 208; *Sherred v. Cisco*, 4 Sandf. 480.

² *Hieatt v. Morris*, 10 Ohio State, 523; *Cutter v. Williams*, 3 Allen, 196; *Weeks v. McMillan*, 13 Daly, 139; *Sharp v. Cheatham*, 88 Mo. 498; *Keating v. Korfhage*, 88 Mo. 524; *Field v. Leiter*, 118 Ill. 17; *Huck v. Flentye*, 80 Ill. 258; *Gorham v. Gross*, 117 Mass. 442; *Shaw v. Hitchcock*, 119 Mass. 254; *Rindge v. Baker*, 57 N. Y. 209; *Greenwald v. Kappes*, 31 Ind. 216; *Standish v. Lawrence*, 111 Mass. 111; *Joy v. Boston Penny Sav. Bank*, 115 Mass. 60; *Richardson v. Tobey*, 121 Mass. 457; *Ensign v. Sharp*, 72 Ga. 708; *Gibson v. Holden*, 115 Ill. 199; *Lawrence v. Hough*, 8 Stew. Ch. 371.

them severally to different persons; the partition walls thereupon become party-walls, and the abutting proprietors take in them the forms of ownership, the easements, and the servitudes pertaining in law to this sort of property.¹

§ 917. **Prescription.** — Adjoining proprietors who occupy a wall between them as a party-wall act thereby in contravention of each other's common-law rights.² Therefore the obstacles to a prescription for a particular sort of lateral support, stated in a preceding section,³ do not apply to a party-wall. It may be prescribed for.⁴

§ 918. **Statutes.** — Largely this subject of party-walls is regulated by statutes, and sometimes even by municipal by-laws,⁵ which vary with the States and in some instances with the cities.⁶ Now, —

§ 919. **Wrongs and Remedies.** — Thus we see that the rights and duties of parties in respect of their party-walls differ with the statutes, with the particular prescription, or with the contract. Yet there are some propositions nearly universal. One owner cannot undermine or otherwise injure or destroy a party-wall to the detriment of the other.⁷ But for the purpose of improvement or repair, either may with due care take it down, in a way not needlessly to harm the other, promptly replacing it.⁸ Of course, within a universal principle limiting every exercise of a right,⁹ one doing this sort of thing will be

¹ *Richards v. Rose*, 9 Exch. 218; *Eno v. Del Vecchio*, 4 Duer, 53, 6 Ib. 17; *Webster v. Stevens*, 5 Duer, 553; *Goldschmid v. Starring*, 5 Mackey, 582; *Ingals v. Plamondon*, 75 Ill. 118; *Koenig v. Haddix*, 21 Ill. Ap. 53.

² Ante, § 915.

³ Ante, § 912.

⁴ *Brown v. Werner*, 40 Md. 15; *Cubitt v. Porter*, 8 B. & C. 257; *Phillips v. Bordman*, 4 Allen, 147; *Eno v. Del Vecchio*, 4 Duer, 53; *Webster v. Stevens*, 5 Duer, 553; *List v. Hornbrook*, 2 W. Va. 340.

⁵ *Hunt v. Ambruster*, 2 C. E. Green, 208.

⁶ *Sauer v. Monroe*, 8 Harris, Pa. 219; *Childs v. Napheys*, 2 Am. Pa.

504; *Sullivan v. Graffort*, 35 Iowa, 531; *Gilbert v. Woodruff*, 40 Iowa, 320; *Graithle v. Hown*, 1 La. An. 140; *Costa v. Whitehead*, 20 La. An. 341; *Jamison v. Duncan*, 12 La. An. 785; *Pierce v. Lemon*, 2 Houst. 519; *Vollmer's Appeal*, 11 Smith, Pa. 118.

⁷ *Bradbee v. Christ's Hospital*, 5 Scott, N. R. 79, 4 Man. & G. 714; *Stedman v. Smith*, 8 Ellis & B. 1; *Eno v. Del Vecchio*, 4 Duer, 53, 6 Ib. 17; *Phillips v. Bordman*, 4 Allen, 147; *Milne's Appeal*, 31 Smith, Pa. 54.

⁸ *Stedman v. Smith*, supra; *Crawshaw v. Sumner*, 56 Mo. 517; *Partridge v. Gilbert*, 15 N. Y. 601; *Evans v. Jayne*, 11 Harris, Pa. 34.

⁹ Ante, § 910.

responsible for any injury inflicted through unreasonable delay or want of due care.¹ This subject might be somewhat further continued ; but we should soon find ourselves where the explanations, to be useful, must be extensive, involving dissimilar statutes, forms of the agreement, and particulars of the prescription. The subject itself is almost foreign to the purposes of this volume. Therefore the unfoldings of it will here close.

V. *Light and Air.*

§ 920. *Differences.* — On the subject of this sub-title, the English law has been widely departed from in the United States, the decisions in our several States are not quite harmonious, and varying statutes have added to the complications. No prudent practitioner will advise upon it without first studying carefully his own local statutes and adjudications. Still some general views will be a helpful introduction to such study.

§ 921. *Air.* — The word “air” is joined to “light” in this sub-title, because such is the common form of language in our books. But the two are not alike. “It is,” said a learned English equity judge, “only in very rare and special cases, involving danger to health, or at least something very nearly approaching it, that the court would be justified in interfering on the ground of diminution of air.”² In the present work, the law of the corruption of air is explained in the chapter on “Nuisance.”³ As air does not, like the beams of light, travel simply in straight lines, but pervades all things, we may doubt whether the cutting off of air from a habitation is ever actionable, if the purity of it remains undiminished. An interruption of the velocity of its flow would often be unpleasant, but an action therefor, where the light had sufficient room, could probably not be maintained.⁴

¹ 3 Kent Com. 437 ; *Crawshaw v. Sumner*, supra ; *Pfluger v. Hocken*, 1 Fost. & F. 142.

² Lord Chancellor Selborne, in *London Brewery v. Tennant*, Law Rep. 9 Ch. Ap. 212, 221.

³ Ante, § 412, 414, 416, 426.

⁴ And see 3 Kent Com. 448 ; *Webb v. Bird*, 10 C. B. N. s. 268, 13 C. B. N. s. 841, 8 Jur. N. s. 621, as to air for a windmill.

§ 922. **Easement in Light — Why.** — Light visits us from all directions. But the ownership of land, while it reaches to “an indefinite extent upwards as well as downwards,”¹ can have no lateral expansions, else the lines of every owner would intermingle with those of every other. Since, therefore, my neighbor is entitled to occupy his lands *ad cælum*, I can have none but vertical light except by his permission. Yet, at this point, the law presents its practical aspect. Because light pervades the whole atmosphere, and visits man from every side, no one is permitted to sue another for having refreshed and strengthened himself from light which had travelled over his grounds.² And still an owner may extend his structures upward, cutting off the light from adjoining estates. Yet any owner may abandon this right in favor of another’s estate; by which abandonment there are created an easement and servitude of light in the respective estates.³ A common method is by —

§ 923. **Contract.** — The easement of light may be created by a direct grant⁴ or by a reservation in a deed of the land.⁵ So, if one sells a parcel of his own land, with a house having windows which overlook unsold land of his, the grantee takes the easement of so much light from it as is essential to the reasonable enjoyment of the estate conveyed.⁶

§ 924. **Prescription.** — Since one whose land is overlooked by windows from land of another has no right of action against him,⁷ it follows that, upon the ordinary principle of prescrip-

¹ 2 Bl. Com. 18.

² Compare with ante, § 890.

³ Moore v. Rawson, 3 B. & C. 332; Embrey v. Owen, 6 Exch. 353, 373; Barker v. Richardson, 4 B. & Ald. 579; Pond v. Metropolitan Elev. Ry. 42 Hun, 567; Honsel v. Conant, 12 Bradw. 259.

⁴ Brooks v. Reynolds, 106 Mass. 31; Burnham v. Nevins, 144 Mass. 88, 94; Harwood v. Tompkins, 4 Zab. 425.

⁵ Cooper v. Louanstein, 10 Stew. Ch. 284.

⁶ Rennyson’s Appeal, 13 Norris, Pa. 147; Havens v. Klein, 51 How. Pr. 82;

United States v. Appleton, 1 Sumner, 492; Palmer v. Fletcher, 1 Lev. 122; Swansborough v. Coventry, 9 Bing. 305, 2 Moore & S. 362; Compton v. Richards, 1 Price, 27. Contra, Keiper v. Klein, 51 Ind. 316; Keats v. Hugo, 115 Mass. 204. And see Riviere v. Bower, Ry. & Moody, N. P. 24; Maynard v. Esher, 5 Harris, Pa. 222; Washb. Easm. 494-497, 504, 505.

⁷ Turner v. Spooner, 1 Drewry & S. 467, 7 Jur. N. S. 1068; Tapling v. Jones, 11 H. L. Cas. 290, 13 C. B. N. S. 876.

tion,¹ an owner of a house with windows opening upon grounds of another cannot forbid his building up against them, however long the house has stood. Still it was early settled in England, under one or another of various forms of reasoning, or as an anomaly in the law, "that," in the words of Washburn, "one may prescribe for the right of light and air to come to his windows unobstructed across the land of another, if enjoyed for twenty years, or the period of ordinary prescription."² And in 1832 this doctrine was affirmed by statute, and the right made "absolute and indefeasible."³ In Delaware⁴ and a few of our other States,⁵ this doctrine is accepted as an inheritance from England; but, in most of them, it is rejected, either as being violative of the rules of prescription, or as not adapted to our new and growing country.⁶

§ 925. *The Doctrine of this Chapter restated.*

Owing to the permanent nature of land, to the constant moving of men and things upon and over it, to the erection of buildings thereon, and to the making of excavations therein, it becomes impossible that any man's ownership should so include every material substance, from the surface upward to heaven and downward to the earth's centre, as to cut off all right and use from every other person. One cannot grasp and hold the air, the sunbeams, or the flowing rivers; each of these will travel onward to bless his neighbors. In each,

¹ Ante, § 912.

² Washb. Eas. 493. Among the cases, some of which he refers to, are *Moore v. Rawson*, 3 B. & C. 332; *Alfred's Case*, 9 Co. 57 b, 58 b; *Cross v. Lewis*, 2 B. & C. 686, 690; *Renshaw v. Bean*, 13 Q. B. 112; *Daniel v. North*, 11 East, 372; *Cotterell v. Griffiths*, 4 Esp. 69.

³ 2 & 3 Will. 4, c. 71; *Harbidge v. Warwick*, 3 Exch. 552.

⁴ *Clawson v. Primrose*, 4 Del. Ch. 643.

⁵ *Lapere v. Luckey*, 23 Kan. 534; *Gerber v. Grabel*, 16 Ill. 217.

⁶ Ante, § 912 and note; *Hayden v.*

Dutcher, 4 Stew. Ch. 217; *Ray v. Sweeney*, 14 Bush, 1; *Turner v. Thompson*, 58 Ga. 268; *Stein v. Hauck*, 56 Ind. 65; *Keiper v. Klein*, 51 Ind. 316; *Mullen v. Stricker*, 19 Ohio State, 185; *Parker v. Foote*, 19 Wend. 309; *Myers v. Gemmel*, 10 Barb. 537; *Ward v. Neal*, 37 Ala. 500; *Richardson v. Pond*, 15 Gray, 387; *Cherry v. Stein*, 11 Md. 1; *Haverstick v. Sipe*, 9 Casey, Pa. 368; *Hubbard v. Town*, 33 Vt. 295; *Morrison v. Marquardt*, 24 Iowa, 35; *Napier v. Bulwinkle*, 5 Rich. 311; *Klein v. Gehrung*, 25 Texas, Sup. 232; *Pierre v. Fernald*, 26 Maine, 436.

they, like himself, have rights. And the same is true of other things involving the like reasons. Out of all, therefore, grow natural easements and servitudes; and, in analogy to them, we have artificial ones, created by contracts, prescriptions, and statutes. In the main, the law of this title follows nature; but it has a few technical rules. And it permits people to buy and sell these rights, and otherwise to regulate the enjoyment of them, the same as other subjects of property, with the like limitation that it must be done after the law's forms and methods. The particulars having been explained throughout the chapter, they need not be here repeated.

CHAPTER XXXIX.

PERSONAL CHATTELS.

§ 926. **Elsewhere.** — The chapter entitled “Conversion of Goods”¹ treats of a common form of wrong to personal chattels. And the expositions in the greater part of the chapter on “Lands”² are almost equally applicable to chattels, especially to those of a permanent sort. Thus, —

§ 927. **Vessel.** — A ship or other like vessel is personal property. But, precisely as under the law of real estate,³ if, through the owner’s carelessness, one lawfully upon it is injured, the owner, or under the maritime rules the vessel itself, must compensate him. It was so, for example, where a man in the dark tumbled to his injury down an open hatchway, which had been negligently left unlighted.⁴ And where a warehouseman’s employee, at work on a vessel’s deck, was hurt by the falling of a skid which a sailor had carelessly unfastened, the vessel was adjudged to be liable.⁵ But contributory negligence will be a bar in this class of cases, the same as in the corresponding ones of negligence on land.⁶ And the ship-owner, like the owner of land,⁷ will not be responsible for an accident to a trespasser.⁸ These several illustrations of the analogy of personal property to real are likewise within the general law of —

§ 928. **Negligence.** — Following the rules in negligence,⁹ one

¹ Ante, § 396 et seq.

² Ante, § 819-859.

³ Ante, § 845-854.

⁴ *The Guillermo*, 26 Fed. Rep. 921.
And see *Belford v. Canada Shipping Co.* 306.
35 Hun. 347.

⁵ *The Polaria*, 25 Fed. Rep. 735.

⁶ *The Privateer*, 14 Fed. Rep. 872;
Anderson v. Scully, 31 Fed. Rep. 161.

⁷ Ante, § 845.

⁸ *Severy v. Nickerson*, 120 Mass.

⁹ Ante, § 433-484.

in possession of another's personal property, however lawfully, and though entitled to use it, will be answerable for any injury to it through a want of due care. For example, a person towing a vessel with a tug, if he negligently draws her too fast, to the damaging of her cargo by a partial submersion, must make good the loss.¹ And the hirer of a horse is responsible for any harm to it resulting from a lack of proper care, or a wrongful use, but not for its becoming sick without his fault.² So any person who, by any other negligent act, does a damage to another's personalty, must recompense him.³ More in general, —

§ 929. **Wrongful Act.** — Any wrongful act, it is immaterial by what name called, whereby one injures the goods of another,⁴ or impairs his apparent ownership,⁵ — as, where he sells or buys them unauthorized,⁶ — or disturbs the possession of them,⁷ or withholds them from the true owner,⁸ or from a person entitled to the possession;⁹ or otherwise deals with them in a way excluding the owner's dominion,¹⁰ will subject the doer to the payment of damages to the person injured.¹¹ At the same time, —

§ 930. **Loss of Ownership.** — Whatever be the wrong done to the chattel of a person who is without fault, and however another may deprive him of the possession, or deny his right thereto, the law will still hold the ownership to be in him, to

¹ *Baird v. Daly*, 68 N. Y. 547.

² *Ante*, § 405; *Hall v. Warner*, 60 Barb. 198; *Wentworth v. McDuffie*, 48 N. H. 402; *Brewster v. Warner*, 136 Mass. 57.

³ *Lotan v. Cross*, 2 Camp. 464.

⁴ *Moore v. Robinson*, 2 B. & Ad. 817; *Beardslee v. French*, 7 Conn. 125; *Angus v. Radin*, 2 Southard, 815; *Dolph v. Ferris*, 7 Watts & S. 367; *Paff v. Slack*, 7 Barr, 254; *Payne v. Smith*, 4 Dana, 497; *White v. Brantley*, 37 Ala. 430.

⁵ *Richards v. Symons*, 8 Q. B. 90; *Mead v. Jack*, 12 Daly, 65; *Johnson v. Farr*, 60 N. H. 426; *Tobin v. Deal*, 60 Wis. 87; *Badger v. Hatch*, 71 Maine, 562.

⁶ *Ante*, § 404; *Church v. McLeod*, 58 Vt. 541; *Scudder v. Anderson*, 54 Mich. 122; *Brayman v. Whitcomb*, 134 Mass. 525; *Hardy v. Clendening*, 25 Ark. 436.

⁷ *Drew v. Spaulding*, 45 N. H. 472; *Woodruff v. Halsey*, 8 Pick. 333; *Stanley v. Gaylord*, 1 Cush. 536; *Carruthers v. Hollis*, 8 A. & E. 113; *Wheeler v. Lawson*, 103 N. Y. 40.

⁸ *Ante*, § 406; *Binstead v. Buck*, 2 W. Bl. 1117; *Lord v. Wardle*, 3 Bing. N. C. 680; *Dusky v. Rudder*, 80 Mo. 400; *Weston v. Carr*, 71 Maine, 356.

⁹ *Roberts v. Wyatt*, 2 Taunt. 268.

¹⁰ *Ante*, § 403.

¹¹ *Ante*, § 22 et seq.

the exclusion of the claim of every wrong-doer. In early times, there were exceptions to this rule, but they have been wearing away with the progress of civilization; until now, in the United States, the exceptions are only trivial seeming ones, or such as proceed necessarily from the due order of society. As to some particulars,—

§ 931. **Stolen Goods.**—The larceny of goods, with the transfer of them by the thief to third persons however innocent, and on however valuable a consideration, will in no circumstances deprive the original owner of his ownership therein. And, wherever he finds them, he is entitled to take them into his possession.¹ Or, if the innocent receiver sells them, he is liable to the owner for their value.² In England, this is qualified by the doctrine of —

§ 932. **Market Overt.**—Sales in “market overt” — which, says Blackstone, “in the country is only held on the special days provided for particular towns by charter or prescription, but in London every day except Sunday,”³ and every shop in London⁴ is a market overt for the sort of goods commonly sold in it — are, by the common law of England, if the purchaser is without fault, an effectual transfer of the ownership, even as to stolen goods.⁵ But statutes have reversed this, as to stolen goods, after the conviction of the thief.⁶ In the United States, the doctrine of market overt is not received.⁷

§ 933. **Goods Fraudulently Obtained,** — not speaking now of those criminal frauds which, like larceny, transfer no title to the person obtaining them,⁸ — where a defeasible title vests

¹ Bishop Con. § 676; *White v. Spettigue*, 13 M. & W. 603; *Lee v. Bayes*, 18 C. B. 599; *Basset v. Green*, 2 Duv. 560.

² *Robinson v. Skipworth*, 23 Ind. 311. And see *Peer v. Humphrey*, 2 A. & E. 495.

³ 2 Bl. Com. 449.

⁴ Otherwise in the country. *Anonymous*, 12 Mod. 521.

⁵ *Lyons v. De Pass*, 11 A. & E. 326; *Crane v. London Dock Co.* 5 Best & S. 313.

⁶ *Walker v. Matthews*, 8 Q. B. D. 109; *Scattergood v. Sylvester*, 15 Q. B. 506.

⁷ *Hardy v. Metzgar*, 2 Yeates, 347; *Lecky v. McDermott*, 8 S. & R. 500; *Dame v. Baldwin*, 8 Mass. 518; *Towne v. Collins*, 14 Mass. 499; *Griffith v. Fowler*, 18 Vt. 390; *Wheelwright v. Depeyster*, 1 Johns. 471; *Roland v. Gundy*, 5 Ohio, 202; *Browning v. Magill*, 2 Har. & J. 308. See *Heacock v. Walker*, 1 Tyler, 338, 341.

⁸ *Noble v. Adams*, 7 Taunt. 59.

in the wrong-doer, may be so transferred to a *bona fide* purchaser for a valuable consideration that the original owner, by whose laches they passed out of his own possession, cannot retake them.¹

§ 934. **Wreck**, — says Blackstone, “by the ancient common law, was where any ship was lost at sea, and the goods or cargo were thrown upon the land; in which case these goods, so wrecked, were adjudged to belong to the king. For it was held that, by the loss of the ship, all property was gone out of the original owner.”² This doctrine was gradually modified by statutes and by the courts; so that, at the present time, probably nothing of it is left in England, certainly nothing in the United States. The marine disaster does not take from the owner his property;³ if it floats to land he may have it;⁴ if derelict at sea, though he may have it, salvage is allowed.⁵ The subject of wrecks is in some measure regulated by statutes.

§ 935. **Goods Abandoned**. — One may relinquish his ownership. He does so, for example, if he casts from him an article of personal property, intending to abandon it. The ownership is thereby transferred to any one who takes it with the intent to appropriate it to himself;⁶ though, until such taking, it remains in the original owner.⁷ But not everything technically called an abandonment has this effect. Thus, goods abandoned at sea do not become the property of the finder;⁸ for the relinquishment is not voluntary, with the intent to terminate the ownership. And, in marine insurance, the abandonment of a vessel or cargo to the underwriters

¹ Explained Bishop Con. § 672, 673; Sheppard v. Shoolbred, Car. & M. 61; Titcomb v. Wood, 38 Maine, 561; Mowrey v. Walsh, 8 Cow. 238. See Dodd v. Arnold, 28 Texas, 97.

² 1 Bl. Com. 290.

³ 2 Kent Com. 321-323; Hamilton v. Davis, 5 Bur. 2732; Constable's Case, 5 Co. 106 a.

⁴ Wyndham's Case, 2 Mod. 294; Whitwell v. Wells, 24 Pick. 25; Clark v. Chamberlain, 2 M. & W. 78. And see 2 Kent Com. 359. There must be an

actual taking of the thing into possession, in distinction from a mere finding and the manifestation of an intent to appropriate it. Eads v. Brazelton, 22 Ark. 499.

⁵ The Island City, 1 Black, 121; The Laura, 14 Wal. 336. And see 2 Bishop Crim. Law, 876 and note.

⁶ 2 Bishop Crim. Law, § 878; McGoon v. Ankeny, 11 Ill. 558.

⁷ Haynes's Case, 12 Co. 113.

⁸ Whitwell v. Wells, 24 Pick. 25.

simply transfers the ownership to them, and no third person can acquire an interest therein.¹

§ 936. **Lost.** — To lose goods is not to abandon them. Therefore the ownership does not pass away from the loser,² even after a long lapse of time.³ This is well illustrated in the criminal law, wherein it is by most courts held that there may be larceny of lost goods.⁴ But the finder of them may, as against all persons except the owner, treat them as abandoned, so that his title to them will be valid unless or until the owner appears and claims them.⁵ If, for example, one picks up an article from the floor of another's shop, which a stranger has there dropped and lost,⁶ or lost money from the floor of a hotel⁷ or railroad car,⁸ he may hold it against the claim of the proprietor of the place. But equally in the law of larceny and in civil jurisprudence, a thing mislaid⁹ is not to be treated as lost within our present rules. Following which distinction, when one entering a barber's shop found upon a table the pocket-book of a preceding customer, accidentally left there, the court held that he was not entitled to retain it as against the shop-owner, though at the time of the litigation it did not appear who was the owner of the pocket-book.¹⁰ This distinction may appear, to one reflecting on it, a little thin and practically too uncertain. If, in the case of the money left on the barber's table, it had been dropped on his floor, the person discovering and claiming it would have held it; being put a little higher, on the table, it went to the shop-owner. Still, as this sort of question must be settled in some way, the solution it has thus received is open to as little

¹ 3 Kent Com. 318, 319; *Comegys v. Vasse*, 1 Pet. 193, 214; *The Mohawk*, 8 Wal. 153.

² *Armory v. Delamirie*, 1 Stra. 505; *McLaughlin v. Waite*, 5 Wend. 404; *Chase v. Corcoran*, 106 Mass. 286; *Wood v. Pierson*, 45 Mich. 313.

³ *Livermore v. White*, 74 Maine, 452.

⁴ 2 Bishop Crim. Law, § 880-883.

⁵ *Armory v. Delamirie*, supra; *Durfee v. Jones*, 11 R. I. 588; *Ellery v. Cun-*

ningham, 1 Met. 112; *Tancil v. Seaton*, 28 Grat. 601; *Bowen v. Sullivan*, 62 Ind. 281.

⁶ *Bridges v. Hawkesworth*, 15 Jur. 1079.

⁷ *Hamaker v. Blanchard*, 9 Norris, Pa. 377.

⁸ *Tatum v. Sharpless*, 6 Philad. 18.

⁹ 2 Bishop Crim. Law, § 879; *Kincaid v. Eaton*, 98 Mass. 139.

¹⁰ *McAvoy v. Medina*, 11 Allen, 548.

objection as any. If the owner of the money, while laying it upon the table, had in words committed it to the barber, by whom he was unknown, for safe keeping, then had forgotten what he did with it, no one would question the barber's superior right. And it may well be assumed that he meant something like this when, instead of dropping it on the floor, he laid it on the table,—an act of care which could proceed only from a purpose. Furthermore, the administering of the law is impossible without an occasional recognition of lines more or less shadowy. Again,—

§ 937. *Care of Thing found.*—Though one finding a thing is under no duty carefully to keep it,¹ if he takes and misuses it to its injury he must respond in damages to its owner should he appear.²

§ 938. *Mixing.*—Where the owner of goods wrongfully mixes them with another's, so that they cannot be identified and separated, he thereby relinquishes them to the other, and is entitled to no part of the intermixture.³ For he can derive no advantage from his own wrong,⁴ and the party without fault is under no duty to surrender any of his goods to prevent loss to the tort-feasor.⁵ But where the goods are distinguishable,⁶ or the intermingling occurred without the owner's fraud or fault,⁷ he will be protected in such way as the circumstances permit.⁸ Thus, if the logs of two owners become innocently intermingled past identification, each may have his proportion of the lumber they produce.⁹ Or if, for storage, the grain of different persons is by the warehouseman put

¹ Ante, § 446.

² *Mulgrave v. Ogden*, Cro. Eliz. 219; *Murgoo v. Cogswell*, 1 E. D. Smith, 359.

³ *The Idaho*, 93 U. S. 575, 585; *Ryder v. Hathaway*, 21 Pick. 298; *Hart v. Ten Eyck*, 2 Johns. Ch. 62; *Stearns v. Herrick*, 132 Mass. 114; *Adams v. Wildes*, 107 Mass. 123; *Beach v. Schmultz*, 20 Ill. 185; *Brackenridge v. Holland*, 2 Blackf. 377; *Lehman v. Kelly*, 68 Ala. 192; *Seavy v. Dearborn*, 19 N. H. 351; *Robinson v. Holt*, 39 N. H. 557; *Brakeley v. Tuttle*, 3 W. Va.

86; *Ward v. Eires*, 1 Rol. 133; *Weil v. Silverstone*, 6 Bush, 698.

⁴ Ante, § 54 et seq.

⁵ *Sims v. Glazener*, 14 Ala. 695.

⁶ *Goff v. Brainerd*, 58 Vt. 468; *Smith v. Sanborn*, 6 Gray, 134; *Queen v. Wernwag*, 97 N. C. 383.

⁷ *Pratt v. Bryant*, 20 Vt. 333.

⁸ *Wetherbee v. Green*, 22 Mich. 311; *Pratt v. Bryant*, 20 Vt. 333; *Monmouth First Nat. Bank v. Dunbar*, 118 Ill. 625.

⁹ *Martin v. Mason*, 78 Maine, 452. See *Clark v. Nelson Lumber Co.* 34 Minn. 239.

together pursuant to a usage not objected to, the mass will be treated by the law as their common property, owned in proportion to their respective deposits. In which proportion, they must severally sustain the loss from any shrinkage.¹ And after the shares of all but one have been withdrawn, the latter owns the remainder in severalty, and he can hold it against the warehouseman and his transferees so long as it can be identified.² Views have occasionally been expressed in some measure differing from these; but the author submits that this statement of the doctrine embodies the true reasoning of the law, and the result of, at least, the better-considered authorities.³

¹ *Dole v. Olmstead*, 36 Ill. 150; *Brown v. Northcutt*, 14 Oregon, 529. And see *Inglebright v. Hammond*, 19 Ohio, 337.

² *Young v. Miles*, 23 Wis. 643. Otherwise while the shares remain mixed. *Preston v. Witherspoon*, 109 Ind. 457. As to fowls mixed, see *Leonard v. Belknap*, 47 Vt. 602.

³ **Another View.** — *Cooley, Torts*, 53, 54, after stating some propositions in substantial accord with my text, adds: "Even if the commingling were malicious or fraudulent, a rule of law which would take from the wrong-doer the whole, when to restore to the other his proportion would do him full justice, would be a rule wholly out of harmony with the general rules of civil remedy, not only because it would award to one party a redress beyond his loss, but also because it would compel the other party to pay, not damages, but a penalty. The infliction of penalties by way of civil remedy is not favored in the law [referring to *Willard Eq.* 56; *Sanders v. Pope*, 12 Ves. 282; *Grigg v. Landis*, 6 C. E. Green, 494]; on the other hand, the law inclines against them, construing contracts so as to avoid them, and in many cases giving relief against them in equity, where the parties have expressly stipulated for them. [Referring to *Crane v. Dwyer*, 9 Mich. 350; *White v. Port Huron*, &c.

Ry. 13 Mich. 356; *Wing v. Bailey*, 14 Mich. 83; *Jaquith v. Hudson*, 5 Mich. 123; *Grigg v. Landis*, 6 C. E. Green, 494; *McKim v. White Hall Co.* 2 Md. Ch. 510; *Skinner v. Dayton*, 2 Johns. Ch. 526; *Skinner v. White*, 17 Johns. 357; *Livingston v. Tompkins*, 4 Johns. Ch. 415; *Cythe v. La Fontain*, 51 Barb. 186; *Baxter v. Lansing*, 7 Paige, 350; *Hagar v. Buck*, 44 Vt. 285; *Walker v. Wheeler*, 2 Conn. 299; *Bowen v. Bowen*, 20 Conn. 127; *Warner v. Bennett*, 31 Conn. 468; *Horsburg v. Baker*, 1 Pet. 232; *Smith v. Jewett*, 40 N. H. 530; *Sanders v. Pope*, 12 Ves. 282; *Davis v. West*, 12 Ves. 475; *Northcote v. Duke*, Amb. 511; 2 Story Eq. Jur. § 1319; *Willard Eq. Jur.* 56.] Therefore the law in these cases does justice between the parties as nearly as, under the circumstances, is practicable, by dividing between them the commingled mass according to their respective proportions. [Referring to *Lupton v. White*, 15 Ves. 432; *Spence v. Union Marine Ins. Co.* Law Rep. 3 C. P. 427; *Ryder v. Hathaway*, 21 Pick. 298; *Robinson v. Holt*, 39 N. H. 557; *Moore v. Bowman*, 47 N. H. 494; *Willard v. Rice*, 11 Met. 493; *Bryant v. Ware*, 30 Maine, 295; *Hesseltine v. Stockwell*, 30 Maine, 237; *Holbrook v. Hyde*, 1 Vt. 286; *Adams v. Meyers*, 1 Saw. 306.] Nor is this method of arranging their interests limited to the

§ 939. **Form Changed.**— Though the form of personal property has been rightfully or wrongfully changed, while the owner has not parted with his title, he may have it, wherever found, in its new shape.¹ Thus, one whose wood another has converted into coal may, if he chooses, take the coal.² And a person whose corn another has wrongfully made into whiskey is entitled to the whiskey.³ If a trespasser cuts trees and makes them into railroad ties, the owner of the land may have

cases in which the commingled mass is exactly the same with the separate particles : it is sufficient that it is practically the same, so that the separation of that which is equivalent in quantity or measure will give to the party whose property has been wrongfully taken that which is substantially equivalent in kind and value. This rule has been applied to the case of quantities of saw-logs, belonging to different parties, but commingled together ; and it is held that to give the party whose logs are lost the option of taking from the mass an equivalent in quantity and quality, or of demanding the value, is all that in justice he can require." Referring to *Stephenson v. Little*, 10 Mich. 433 ; *Jenkins v. Steanka*, 19 Wis. 139 ; *Ryder v. Hathaway*, 21 Pick. 298 ; *Hesseltine v. Stockwell*, 30 Maine, 237 ; *Smith v. Morrill*, 56 Maine, 566. I add a reference to *Schulenberg v. Harriman*, 21 Wal. 44, 64. Of course, the reader who is investigating this subject will look into the cases cited on the one side and on the other, and determine for himself how far they sustain any particular proposition. As I understand the question, when two persons appear before the court equally innocent, there must be an equitable adjustment of their respective claims, or justice cannot be done between them. And for a case of this sort the methods stated in the foregoing extract appear to be good. But if a man, to perpetrate a fraud on another, mingles goods with his past identification, the law explained in my text does not, as this extract seems to imply,

undertake to forfeit them as a penalty for the wrong. It simply refuses to listen to one who comes complaining that he had endeavored to violate the law's rules of justice, but by miscarriage had failed, and asking the court to help him out of the difficulty. Or, to put the case less strongly, though the court may resort to equitable principles for the adjustment of the rights of two innocent persons whose goods have been unfortunately commingled, a fraudulent one, who has unsuccessfully attempted to cheat the other by a mixing, ought, at least, to be compelled to prove title to the goods he demands. And he does not do this, in accordance with the ordinary rules of the law, when he shows that some of the goods may probably be his, while others are not, and he can give no intimation which of the particular ones are of the one class and which of the other. Certainly it is not a violation of the ordinary rules of legal justice for the court to refuse to pick up a stumbling assaulter of the rights of innocent men. On the other hand, it is the common course of the court, and but common justice, to leave such a party, unaided by the judicial hand, to lie in the bed which he has made for himself. Ante, § 54-65.

¹ *Betts v. Lee*, 5 Johns. 348 ; *Curtis v. Groat*, 6 Johns. 168 ; *Babcock v. Gill*, 10 Johns. 287 ; *Freeman v. McLennan*, 26 Kan. 151 ; *Stevens v. Briggs*, 5 Pick. 177 ; *Worth v. Northam*, 4 Ire. 102 ; *Gallup v. Josselyn*, 7 Vt. 334.

² *Riddle v. Driver*, 12 Ala. 590.

³ *Silsbury v. McCoon*, 3 Comst. 379.

them even as against an innocent purchaser.¹ Nor is it material what the transmutation is; while the owner can trace and identify the thing,² he may have it.³ Yet this doctrine has its equitable limits, not probably definable by exact rule. Thus, it has been deemed that one taking another's materials in good faith⁴ believing them to be his, and manufacturing them by much labor,—as, where he converts standing trees into hoops,—may hold the product as against the true owner of the materials.⁵ Or, if the materials of two or more persons enter into a manufactured article, it belongs to the one who furnished the principal part.⁶

§ 940. **A Lawsuit** — may transmute the ownership of a chattel, in the way pointed out in a preceding chapter.⁷

§ 941. *The Doctrine of this Chapter restated.*

The duty of the owner of property to take such care of it, and keep it in such a condition, as to avoid injuries to third persons coming lawfully in contact with it, does not depend on the sort of property, but it is the same in respect of personal chattels as of real estate. One is not required to employ precautions in the interest of trespassers; but, for a neglect whereby harm comes to another in lawful contact with a chattel, the owner or person having the charge of it must respond in damages. On the other hand, he who unlawfully injures another's chattel, or disturbs the apparent ownership, or the possession, may be compelled by the owner to make him proper compensation. A lawsuit to enforce this sort of claim will in some circumstances transmit the ownership to the wrong-doer, in part or full return for the money which the court requires him to pay. Otherwise no wrong done to it or its owner will deprive him of the ownership.

¹ *Strubbee v. Cincinnati Ry. Trustees*, 78 Ky. 481.

² *Silsbury v. McCoon*, 4 Denio, 332.

³ *Williams v. McClanahan*, 3 Met. Ky. 420.

⁴ Otherwise if in bad faith, or "willfully as a trespasser." 2 Kent Com.

363; *Hyde v. Cookson*, 21 Barb. 92; *Betts v. Lee*, 5 Johns. 348.

⁵ *Wetherbee v. Green*, 22 Mich. 311.

⁶ *Pulcifer v. Page*, 32 Maine, 404; *Merritt v. Johnson*, 7 Johns. 473; *Gregory v. Stryker*, 2 Denio, 628.

⁷ *Ante*, § 399, 408.

CHAPTER XL.

PRIVATE DEFENCE OF SELF AND PROPERTY.

§ 942. **In Another Work**, — the author has so far treated of this subject as to render any full exposition of it here unnecessary.¹ Yet a few elucidations are desirable. Thus, —

§ 943. **Trespassing Persons and their Animals**. — We have considered by what means one may remove trespassing persons from his house or grounds, and what automatic forces he may employ as preventives.² He may with due care drive from his land another's cattle or other creatures unlawfully there,³ yet he must not kill or harm them.⁴ Beyond which, he has his action for damages against the general or special owner.⁵ Assuming that a man may set on his land spring-guns as a protection against trespassing men who have notice of them,⁶ there appears to be no corresponding doctrine as to their trespassing animals; for the owner of an animal cannot teach it the precautions which he might himself exercise.⁷

¹ 1 Bishop Crim. Law, § 836-877.

² Ante, § 824, 825, 846, 847; *Abt v. Burgheim*, 80 Ill. 92; *Fosbinder v. Svitak*, 16 Neb. 499.

³ *Gilman v. Emery*, 54 Maine, 460; *Wood v. La Rue*, 9 Mich. 158; *Totten v. Cole*, 33 Mo. 138; *Humphrey v. Douglass*, 11 Vt. 22, 10 Vt. 71; *Cory v. Little*, 6 N. H. 213; *Davis v. Campbell*, 23 Vt. 236.

⁴ Ante, § 550; *Com. Dig. Trespass, D*; *Spray v. Ammerman*, 66 Ill. 309; *Ladue v. Branch*, 42 Vt. 574; *Cantrell v. Adderholt*, 28 Ga. 239; *Tyner v. Cory*, 5 Ind. 216; *Bost v. Minguess*, 64 N. C. 44; *Livermore v. Batchelder*, 141 Mass. 179; *Amick v. O'Hara*, 6 Blackf.

258; *Matthews v. Fiestel*, 2 E. D. Smith, 90; *Dodson v. Mock*, 4 Dev. & Bat. 146; *McIntire v. Plaisted*, 57 N. H. 606; *Hobson v. Perry*, 1 Hill, S. C. 277; *McCoy v. Phillips*, 4 Rich. 463; *Ford v. Taggart*, 4 Texas, 492.

⁵ *Dolph v. Ferris*, 7 Watts & S. 367; *Weymouth v. Gile*, 72 Maine, 446; *Noyes v. Colby*, 10 Post. N. H. 143; *Partenheimer v. Van Order*, 20 Barb. 479.

⁶ Ante, § 847.

⁷ **Dog-spears**. — Still, in England, after some difference of judicial opinion, it appears to be settled that one may, without responsibility for a dog killed, set dog-spears for the preservation of his

When, therefore, one to prevent a repetition of trespasses by his neighbor's fowls, spread on his land poisoned food, and notified him of it, he was still held liable for injuries to them from eating it during a subsequent trespass.¹ *A fortiori*, one who has told the owner of hens that he will kill them when next found on his grounds must pay the damages if he does it.² Practically the right of action for damages is often a very inadequate remedy for petty and persistent annoyances from neighboring poultry and dogs,³ and the subject is worthy of more legislative attention than it generally receives.

§ 944. **Resisting Trespass to Person.** — One may resist a trespass to his person, therein employing the force necessary, yet no more.⁴ In defence of his castle,⁵ or to preserve his life or avoid great bodily harm, he may, when inevitable, kill the assailant; but in other circumstances he must yield, and seek redress from the law, rather than take life.⁶ Hence, —

§ 945. **To Property.** — No trespass to mere property, not done with intent to perpetrate a felony, will justify the killing of the aggressor, or the committing of a riot, forcible detainer, or other crime; yet, short of this, the owner may make resistance by whatever force is necessary.⁷ And, if the defence of one's person requires, not otherwise, he may kill another's attacking animal.⁸

§ 946. *The Doctrine of this Chapter restated.*

While the law tenders its judicial redress to every one injured in person or property, it also accords to him certain natural rights of defending each by his own private strength.

game, especially if he gives notice to the owner of the dog. *Jordin v. Crump*, 8 M. & W. 782, and the cases cited by the court.

¹ *Johnson v. Patterson*, 14 Conn. 1.

² *Clark v. Keliher*, 107 Mass. 406.

³ See ante, § 68.

⁴ Ante, § 199, 200.

⁵ Ante, § 816.

⁶ 1 Bishop Crim. Law, § 858, 865, 868-870, and connected places.

⁷ *Ib.* § 875; *Corey v. People*, 45 Barb. 262; *United States v. Bartle*, 1 Cranch C. C. 236; *Commonwealth v. Kennard*, 8 Pick. 133.

⁸ *Wright v. Ramscot*, 1 Saund. 84; *Morse v. Nixon*, 8 Jones, N. C. 35; *King v. Kline*, 6 Barr, 318; *Ford v. Taggart*, 4 Texas, 492; *Boecher v. Lutz*, 13 Daly, 28; *Livermore v. Batchelder*, 141 Mass. 179; *Hinckley v. Emerson*, 4 Cow. 351.

And herein he may have the assistance of others.¹ But, except to save his own life, to protect himself from great bodily harm, to resist a breaking into his castle, or the commission of a felony,² he must avoid the taking of human life. And, beyond this, he will be a wrong-doer whenever he opposes a trespasser by a force needless in kind or degree, thereby inflicting on him an avoidable injury. To the criminal law he will be answerable whenever his resistance is so tumultuous as to create a breach of the peace; but not always to the civil.³ A trespassing animal may be driven away; yet not needlessly beaten to its damage, or killed, because this extreme measure is not ordinarily necessary. But if necessary to the defence of the person,⁴ or even of property,⁵ the beating or killing will be permitted.

¹ 1 Bishop Crim. Law, § 877.

² *Ib.* § 842, 843, 849, 853, 867.

³ *Ante*, § 197 and note, 825. And

see *Denver, &c. Ry. v. Harris*, 122 U. S. 597.

⁴ *Ante*, § 106.

⁵ *Ante*, § 945.

CHAPTER XLI.

PUBLIC WAYS.

- § 947. Introduction.
- 948-956. In General of Subject.
- 957-988. Establishing and Repairing.
- 989-1001. Owners and Dwellers along.
- 1002-1004. Third Persons Injuring.
- 1005-1021. Rights and Wrongs in Using.
- 1022. Doctrine of Chapter restated.

§ 947. **How Chapter divided.** — We shall consider, I. In General of the Subject; II. Establishing and Repairing the Way; III. The Owners and Dwellers along Public Ways; IV. Third Persons Injuring a Public Way; V. Rights and Wrongs in using Public Ways.

I. *In General of the Subject.*

§ 948. **Defined.** — A public way, otherwise termed a highway,¹ is any way,² whether upon land or water, over which all the public have the equal right to pass,³ either generally, or in a defined and limited manner,⁴ or upon a condition, or to transport goods.⁵ Still,—

¹ 3 Kent Com. 432; Reg. v. Saintiff, Holt, 129, 6 Mod. 255; Allen v. Ormond, 8 East, 4, 6; Vantilburgh v. Shann, 4 Zab. 740; Commonwealth v. Hubbard, 24 Pick. 98, 101.

² Ante, § 866.

³ Rex v. Richards, 8 T. R. 634, 637; People v. Jackson, 7 Mich. 432.

⁴ "The word 'highway' is the genus of all public ways, as well cart, horse, and footway." Reg. v. Saintiff,

supra; Stafford v. Coyney, 7 B. & C. 257.

⁵ 2 Bishop Crim. Law, § 1266. "Every thoroughfare which is used by the public, and is, in the language of the English books, 'common to all the king's subjects,' is a highway, whether it be a carriage-way, a horse-way, a footway, or a navigable river." 3 Kent Com. 432. Consult also Macomber v. Nichols, 34 Mich. 212; Poole

§ 949. **Flexible** — (**In Statute**). — The term “highway,” like most others even in our legal language, is a little flexible in meaning. So that, for example, it may in a statute signify something more or less than as just defined.¹ Now, —

§ 950. **Civil and Criminal**. — The subject of public ways belongs both to our civil and criminal law. Obstructions of them and neglects to keep them in repair are indictable.² Hence, for the crime viewed as a wrong to the public, a mere partaker of the general detriment cannot maintain an action; but one who has suffered a special damage, can.³ For example, if by reason of an indictable obstruction, a person has been compelled to travel circuitously to a point which he had occasion to reach,⁴ or if his vehicle has been overturned,⁵ the author of the obstruction must compensate him. In the present chapter, wrongs connected with public ways will be considered only in their civil aspect.

§ 951. **Common Carriage-ways** — (“**Street**”). — A “street” is a highway, the term being commonly limited in meaning to one in a city or village.⁶ The ordinary foot and carriage-ways, whether of town or country, are those concerning which legal questions most frequently arise; and the greater part of the elucidations of this chapter relate primarily to them, while generally the principles are equally applicable to all the rest. Some preliminaries regarding the other ways will be helpful; thus, —

§ 952. **Bridge**. — This structure, for bearing travel over a

v. Huskinson, 11 M. & W. 827; *Wood v. Veal*, 5 B. & Ald. 454; *The State v. Nudd*, 3 Fost. N. H. 327; *The State v. Johnson*, Phillips, N. C. 140.

¹ *Blackstone v. Worcester*, 108 Mass. 68; *Glass v. The State*, 30 Ala. 529; *The State v. Harden*, 11 S. C. 360; *Seneca Road v. Auburn, &c. Rld.* 5 Hill, N.Y. 170; *Cleaves v. Jordan*, 34 Maine, 9; *Jones v. Andover*, 6 Pick. 59; *Harding v. Medway*, 10 Met. 465; *Waterford v. Oxford*, 59 Maine, 450.

² 2 Bishop Crim. Law, § 1264 et seq.

³ Ante, § 71; *Patterson v. Detroit, &c. Rld.* 56 Mich. 172; *Powell v.*

Bunger, 91 Ind. 64; *Wilder v. De Cou*, 26 Minn. 10; *Matlock v. Hawkins*, 92 Ind. 225; *Pain v. Patrick*, 3 Mod. 289, 291; *Smith v. Smith*, 2 Pick. 621, 623.

⁴ *Hart v. Basset*, T. Jones, 156; *Chichester v. Lethbridge*, Willes, 71.

⁵ *Taylor v. Boston Water Power Co.* 12 Gray, 415.

⁶ *Cox v. Louisville, &c. Rld.* 48 Ind. 178; *Morris v. Bowers*, Wright, Ohio, 749; *Glasgow v. St. Louis*, 87 Mo. 678; *Brace v. New York Cent. Rld.* 27 N. Y. 269, 271; *Conner v. New Albany*, 1 Blackf. 88.

stream or chasm, is, if public, a part of the highway.¹ It may be laid out, built, and kept in repair as such;² or, what is more common, its construction and care may be regulated by statutes special to bridges, or to the particular bridge.³ Sometimes, under statutory authority, it is built by private enterprise and supported by tolls.⁴ In all which cases, those responsible for its condition must compensate persons injured through their negligence in its construction or repair, after the same rules which apply to the other parts of a public way.⁵ But they have not the liabilities of common carriers; for they have not possession or even custody of the passing people and effects.⁶

§ 953. **Over Navigable Waters.** — Whether, or to what extent, navigable waters shall be obstructed for the benefit of land-travel is a question exclusively for the sovereign power. And though the legislature may delegate to an inferior branch of the government the authority to decide it, a mere jurisdiction to lay out public ways will not be construed as a permission to establish a bridge over such waters.⁷ A statute may give the right, and impose suitable conditions.⁸ In the ab-

¹ Bishop Stat. Crimes, § 301; *The State v. Gloucester*, 11 Vroom, 302.

² *Jaquish v. Ithaca*, 36 Wis. 108; *Rex v. Yorkshire W. R. Loft*, 238; *Perley v. Chandler*, 6 Mass. 454; *The State v. Campton*, 2 N. H. 513; *The State v. Canterbury*, 8 Fost. N. H. 195; *Stark v. People*, 118 Ill. 459.

³ *Sheldon v. The State*, 59 Vt. 36; *People v. Supervisors*, 21 Ill. Ap. 271; *McKethan v. Cumberland*, 92 N. C. 243; *Logan v. People*, 116 Ill. 466; *Pittsburg v. Clarksville*, 58 N. H. 291.

⁴ *Plecker v. Rhodes*, 30 Grat. 795; *Union Bridge v. Spaulding*, 63 N. H. 298; *Dyer v. Tuskaloosa Bridge*, 2 Port. 296; *Compton v. Waco Bridge*, 62 Texas, 715; *Maxwell v. Bay City Bridge*, 46 Mich. 278; *Young v. Buckingham*, 5 Ohio, 485; *Commonwealth v. New Bedford Bridge*, 2 Gray, 339; *People v. Thompson*, 21 Wend. 235, 23 Wend. 537; *Charles River Bridge v. Warren Bridge*, 7 Pick. 344.

⁵ *Heacock v. Sherman*, 14 Wend. 58; *Tift v. Jones*, 74 Ga. 469; *Whitman v. Groveland*, 131 Mass. 553; *Whipple v. Walpole*, 10 N. H. 130; *Dygert v. Schenck*, 23 Wend. 446; *Bardwell v. Jamaica*, 15 Vt. 438; *Randall v. Cheshire Turnpike*, 6 N. H. 147; *Weisenberg v. Winneconne*, 56 Wis. 667; *Dickie v. Boston, &c. Rld.* 131 Mass. 516; *Nowell v. Wright*, 3 Allen, 166; *Holmes v. Hamburg*, 47 Iowa, 348; *Townsend v. Susquehannah Turnpike*, 6 Johns. 90.

⁶ *Grigsby v. Chappell*, 5 Rich. 443; *Frankfort Bridge v. Williams*, 9 Dana, 403.

⁷ *Commonwealth v. Coombs*, 2 Mass. 489, 492; *Arundel v. McCulloch*, 10 Mass. 70; *Commonwealth v. Charlestown*, 1 Pick. 180; *Maxwell v. Bay City Bridge*, 41 Mich. 453.

⁸ *Commonwealth v. Breed*, 4 Pick. 460; *Baltimore v. Stoll*, 52 Md. 435; *Commonwealth v. Taunton*, 7 Allen, 309.

sence of any interference by the Congress or courts of the United States, this power is complete in the States;¹ and it is believed that, as to navigable waters limited to a particular State, and so situated that there can be no connected line of commerce by water between them and any other State or country, the authority of the State is exclusive.² But, "to regulate commerce with foreign nations and among the several States,"³ Congress may in all other cases take the control and exclude the State's, both removing obstructions already made under State authority, and rendering nugatory State legislation in the future;⁴ the doctrine being, that while and so far as the national power sleeps, the States may act, but no longer or further. And still the United States tribunals will, in cases of danger to commerce sufficiently extreme, interpose by injunction.⁵ Hitherto we have had some national legislation of a general sort regulating bridges and other like obstructions,⁶ and detailed permissions to build particular bridges,⁷ but no general taking of the jurisdiction from the States.

§ 954. **Ferry.** — A ferry is a public boat-way over waters between two points of land, or the franchise of it, for all persons travelling on foot or with their vehicles, paying toll.⁸

¹ *Gilman v. Philadelphia*, 3 Wal. 713; *Pound v. Turek*, 95 U. S. 459; *Willamette Iron Bridge v. Hatch*, 125 U. S. 1.

² *Veazie v. Moor*, 14 How. U. S. 568, 573, 574.

³ Const. U. S. art. 1, § 8.

⁴ *Gilman v. Philadelphia*, *supra*; *Willamette Iron Bridge v. Hatch*, *supra*.

⁵ *Gilman v. Philadelphia*, *supra*, and other cases above cited; *Albany Bridge Case*, 2 Wal. 403; *Silliman v. Hudson River Bridge*, 1 Black, 582.

⁶ R. S. of U. S. § 5244-5255.

⁷ *Hannibal, &c. Rld. v. Missouri River Packet Co.* 125 U. S. 260; *People v. Kelly*, 76 N. Y. 475; *Miller v. New York*, 109 U. S. 385.

⁸ *Bishop Stat. Crimes*, § 301 *a*. Looking into the books for definitions, I do not discover any very serviceable

ones. See the various law dictionaries, also *Newton v. Cubitt*, 12 C. B. N. s. 32; *Munroe v. Thomas*, 5 Cal. 470; *Thomas v. Armstrong*, 7 Cal. 286; *Milton v. Haden*, 32 Ala. 30; *The State v. Wilson*, 42 Maine, 9; *New York v. Starin*, 106 N. Y. 1; *Clark v. Union Ferry*, 35 N. Y. 485. I hesitated whether or not to insert in my definition, after the common forms, the element of toll. In *Attorney-General v. Boston*, 123 Mass. 460, 468, Gray, C. J. observes: "The definition of a ferry in the early books is 'a liberty by prescription, or the king's grant, to have a boat for passage upon a great stream for carriage of horses and men for reasonable toll.' And according to all the authorities, English and American, the grant of a ferry, in its very nature, implies the taking of tolls by the grantee." Among

By the English rulings, this franchise appears to be deemed, in its nature, without express terms, exclusive;¹ but in the United States it is otherwise,² while yet its particular terms may render it so here.³ One who accepts the grant of a ferry is thereby "bound to keep a boat for the public good,"⁴ and reasonably to transport all applicants.⁵ He is a common carrier, and is usually, not in all circumstances, said to have in his possession his passengers and their effects; so that to them he is under the ordinary responsibilities, with the privileges, of other common carriers.⁶ The ferries over the navigable waters are not, like the bridges, subject to the national jurisdiction; but they proceed from State authority uncontrolled, sometimes from that of two adjoining States.⁷ It is

the cases to which he refers are *North, &c. Ferry v. Barker*, 2 Exch. 136, 149; *Fay*, Petitioner, 15 Pick. 243, 249, 250; *Newburgh, &c. Turnpike v. Miller*, 5 Johns. Ch. 101, 112; *Aikin v. Western Rld.* 20 N. Y. 370, 379, 386. In matter of fact our ferries are supported by tolls. Yet, on the other hand, it is correct in language to speak of a free ferry. So, also, there may be a private "ferry," and it would not be within our definition. The keeper of a public ferry, we shall see, is a common carrier; but the keeper of a private one—as, a mill-owner who conveys his customers to and from his mill without charge—is not such; his liabilities to persons conveyed being less. *Self v. Dunn*, 42 Ga. 528. It follows that the element of pay, expressed in our definition by the word "toll," is essential to the ferry as commonly understood in our law, though there may be a different sort of "ferry" without it. And this view is confirmed by the fact that all our definitions of a "common carrier" contain also, and justly, in some form of words, the idea of remuneration.

¹ *Newton v. Cubitt*, supra.

² *Fanning v. Gregoire*, 16 How. U. S. 524; *East Hartford v. Hartford Bridge*, 10 How. U. S. 511; *Shorter v. Smith*, 9 Ga. 517; *Perrin v. Oliver*, 1 Minn.

202; *Bush v. Peru Bridge*, 3 Ind. 21; *Power v. Athens*, 99 N. Y. 592.

³ *New York v. Starin*, supra.

⁴ *Payne v. Partridge*, 1 Show. 255, 257; *Richards v. Fuqua*, 28 Missis. 792; *Letton v. Goodden*, Law Rep. 2 Eq. 123.

⁵ *Pate v. Henry*, 5 Stew. & P. 101; *Wallen v. McHenry*, 3 Humph. 245.

⁶ *Harvey v. Rose*, 26 Ark. 3; *Compton v. Van Volkenburgh*, 5 Vroom, 134; *Cohen v. Hume*, 1 McCord, 439; *Whitmore v. Bowman*, 4 Greene, Iowa, 148; *Miles v. James*, 1 McCord, 157; *Rutherford v. McGowen*, 1 Nott & McC. 17; *Pomeroy v. Donaldson*, 5 Mo. 36; *Fisher v. Clisbee*, 12 Ill. 344; *Slimmer v. Merry*, 23 Iowa, 90; *Wilson v. Hamilton*, 4 Ohio State, 722; *Wilson v. Shulkin*, 6 Jones, N. C. 375; *Powell v. Mills*, 37 Missis. 691; *White v. Winisimmet Co.* 7 Cush. 155; *Yerkes v. Sabin*, 97 Ind. 141; *Loftus v. Union Ferry*, 84 N. Y. 455; *Burton v. West Jersey Ferry*, 114 U. S. 474.

⁷ *Conway v. Taylor*, 1 Black, 603, 633; *Marshall v. Grimes*, 41 Missis. 27; *Starin v. New York*, 115 U. S. 248; *Weld v. Chapman*, 2 Iowa, 524; *Newport v. Taylor*, 16 B. Monr. 699; *People v. Babcock*, 11 Wend. 586.

perceived, therefore, that they are public ways, yet differing considerably from the land-roads.

§ 955. **Navigable Waters.** — All navigable waters, whether inland or ocean, are public ways.¹ Therefore, for example, one who obstructs a river is liable in damages to a person thereby specially injured in his lawful navigation of it.² And if one's vessel or other substance is sunk, to the endangering of navigation, he should, for the protection of the public, put over it a buoy.³ The power to authorize and remove obstructions is within the explanations given as to bridges.⁴

§ 956. **Other Public Ways.** — Public squares,⁵ turnpike roads, plank roads, railroads,⁶ canals,⁷ and some other things of the like sort are classed as public ways, but they need not be further explained in this connection.

II. *Establishing and Repairing the Way.*

§ 957. **Order of Exposition.** — We shall consider the subject of this sub-title as to, First, By whom and how the ordaining and making of the way; Secondly, On whom and how the responsibilities for its condition; Thirdly, After what preliminaries the liability to third persons attaches; Fourthly, In what condition the way must be put and kept; Fifthly, Permitting steam and other cars thereon; Sixthly, Licensing other obstructions.

§ 958. **First. *By whom and how the Ordaining and Making of the Way:*** —

Ordaining. — The methods of creating highways differ somewhat in the respective States. Perhaps in all there may be a

¹ Bishop Stat. Crimes, § 302-304; Co. 2 Bosw. 106; Onderdonk v. Smith, 21 Fed. Rep. 588.

² Bishop Crim. Law, § 1271; Walker v. Allen, 72 Ala. 456; Shaw v. Oswego Iron Co. 10 Oregon, 371; Rex v. Hammond, 10 Mod. 382; Huse v. Glover, 119 U. S. 543.

³ Benson v. Malden, &c. Gas-light Co. 6 Allen, 149; Rose v. Miles, 4 M. & S. 101; Omslaer v. Philadelphia Co. 31 Fed. Rep. 354.

⁴ Harmond v. Pearson, 1 Camp. 515. And see Taylor v. Atlantic Mut. Ins. Co. 2 Bosw. 106; Exchange Fire Ins. Co. v. Delaware, &c. Canal, 10 Bosw. 180.

⁵ Ante, § 953; Pound v. Turck, 95 U. S. 459; Huse v. Glover, supra.

⁶ 2 Bishop Crim. Law, § 1269.

⁷ Ib. § 1270; Baltimore, &c. Turnpike v. Cassell, 66 Md. 419; Noblesville, &c. Gravel Road v. Gause, 76 Ind. 142.

way by dedication, which consists of the owner of land signifying in any appropriate manner, with or without writing, his consent that a particular portion of it may be used for a public way, followed by an acceptance by the proper authorities, or by a public use, in pursuance of such dedication.¹ After a dedication, and rights acquired thereunder; the owner is estopped to revoke it;² and, after its acceptance and use by a municipal corporation, it is estopped in like manner.³ There are also public ways by prescription.⁴ But in all our States the common method is for the proper officers to lay out the way under the authority of a statute, dispossessing when necessary the land-owner by the right of eminent domain, and making him compensation.⁵

§ 959. **Who Build and Repair.**—The statutes determine what person or corporation shall build and repair the highways. Not often, but in exceptional instances, the duty is cast upon the adjoining land-owners either generally,⁶ or in respect of sidewalks,⁷ or paving;⁸ or, in consideration of the

¹ *Manderschid v. Dubuque*, 29 Iowa, 73; *Brooks v. Topeka*, 34 Kan. 277; *In re Pearl St.* 1 Am. Pa. 565; *Rathman v. Norenberg*, 21 Neb. 467; *St. Louis v. St. Louis University*, 88 Mo. 155; *Prouty v. Bell*, 44 Vt. 72; *Wisby v. Bonte*, 19 Ohio State, 238; *Hawley v. Baltimore*, 33 Md. 270; *Moses v. St. Louis Sect. Dock Co.* 84 Mo. 242; *Rozell v. Andrews*, 103 N. Y. 150; *Boyer v. The State*, 16 Ind. 451; *Macon v. Franklin*, 12 Ga. 239; *Hoole v. Attorney-General*, 22 Ala. 190; *Proctor v. Lewiston*, 25 Ill. 153; *Banks v. Ogden*, 2 Wal. 57; *Curtiss v. Hoyt*, 19 Conn. 154; *Simmons v. Cornell*, 1 R. I. 519; *Baldwin v. Buffalo*, 35 N. Y. 375; *Kennedy v. Cumberland*, 65 Md. 514.

² *Macon v. Franklin*, 12 Ga. 239; *Haynes v. Thomas*, 7 Ind. 38; *Mankato v. Willard*, 13 Minn. 13; *Leffer v. Burlington*, 18 Iowa, 361; *Cincinnati v. White*, 6 Pet. 431.

³ *Leavenworth v. Laing*, 6 Kan. 274; *Gallagher v. St. Paul*, 28 Fed. Rep. 305.

⁴ *Veale v. Boston*, 135 Mass. 187;

Krier's Private Road, 23 Smith, Pa. 109; *Burnham v. McQuesten*, 48 N. H. 446; *Green v. Bethea*, 30 Ga. 896; *Commonwealth v. Old Colony, &c. Rld.* 14 Gray, 93; *Lewiston v. Proctor*, 27 Ill. 414; *Stetson v. Faxon*, 19 Pick. 147.

⁵ Ante, § 119, 120; *Randall v. Conway*, 63 N. H. 513; *Hendershot v. The State*, 44 Ohio State, 208; *Galbraith v. Littlech*, 73 Ill. 209; *Warren v. Davis*, 43 Ohio State, 447; *Taylor v. Woburn*, 130 Mass. 494; *Winchester v. Capron*, 63 N. H. 605; *Trickey v. Schlader*, 52 Ill. 78; *Cooper v. Detroit*, 42 Mich. 584; *Blackman v. Halves*, 72 Ind. 515; *United States v. Railroad Bridge*, 6 McLean, 517.

⁶ *Menasha v. The Portage*, 26 Wis. 534.

⁷ *Marquette v. Cleary*, 37 Mich. 296; *Manchester v. Hartford*, 30 Conn. 118; *Plattsmouth v. Mitchell*, 20 Neb. 228.

⁸ *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1; *Sheley v. Detroit*, 45 Mich. 431.

value of the way to the land-owner, he assumes it by agreement.¹ But commonly this work is done by a municipal corporation on which a statute casts the duty.² If the corporation accepts what a private person has built, it is under the same obligation to keep it in repair, followed by the same liabilities for neglect, as if constructed by itself.³ Hence, —

§ 960. Secondly. *On whom and how the Responsibilities for its Condition : —*

Determined by Statute. — The person or corporation building a public way is not necessarily responsible thereafter for its condition.⁴ This question is in many cases — as, for example, in respect of township highways in New England⁵ — settled by express statutory terms.⁶ But oftener the responsibility comes indirectly from the statute, as a result of the rule that the person or corporation whereon the law casts the duty of construction or repair is answerable to third persons injured through its neglect.⁷ The exceptions to this rule relate to certain municipal or *quasi* municipal corporations, under the interpretations of a part of the States, — a question elucidated in a preceding chapter.⁸ And, —

§ 961. **Under Contract.** — Though the corporation responsible for the condition of the streets lets out the work of repair to a contractor, its liabilities are not thereby diminished, — as explained in a preceding chapter.⁹ Nor is it made otherwise

¹ *Lowell v. Proprietors of Locks, &c.* 104 Mass. 18. See *Brookfield v. Walker*, 100 Mass. 94.

² *Ante*, § 758.

³ *Manchester v. Hartford*, *supra*; *The State v. Useful Manuf. Soc.* 15 Vroom, 502.

⁴ *Carpenter v. Nashua*, 58 N. H. 37; *Nelson v. Canisteo*, 100 N. Y. 89; *Taylor v. Yonkers*, 105 N. Y. 202; *Platts-mouth v. Mitchell*, 20 Neb. 228; *Streeter v. Breckemridge*, 23 Mo. Ap. 244; *Barnes v. Newton*, 46 Iowa, 567; *Willey v. Ellsworth*, 64 Maine, 57.

⁵ *Ante*, § 766.

⁶ *Papworth v. Milwaukee*, 64 Wis. 389; *Wentworth v. Rochester*, 63 N. H. 244; *Bemis v. Arlington*, 114 Mass.

507; *Perkins v. Oxford*, 66 Maine, 545; *Acker v. Anderson*, 20 S. C. 495; *Willard v. Sherburne*, 59 Vt. 361; *Nichols v. Minneapolis*, 30 Minn. 545.

⁷ *Ante*, § 757, 758, 766; *Tritz v. Kansas*, 84 Mo. 632; *Russell v. Canastota*, 98 N. Y. 496; *Marquette v. Cleary*, 37 Mich. 296; *Sheridan v. Salem*, 14 Oregon, 328; *Saulsbury v. Ithaca*, 94 N. Y. 27; *Bohen v. Waseca*, 32 Minn. 176; *Bunch v. Edenton*, 90 N. C. 431.

⁸ *Ante*, § 749, 750, 755-759, 766.

⁹ *Ante*, § 602-605; *Jacksonville v. Drew*, 19 Fla. 106; *Brooks v. Somerville*, 106 Mass. 271; *Hawxhurst v. New York*, 43 Hun, 588.

by a statute requiring the contract to be with the lowest bidder.¹ Of course, —

§ 962. **Two Answerable.** — The contractor, in a case like this, would himself be answerable to any person suffering through a negligent performance of his contract duty.² On the same principle, if a house-owner on a street has a cellar-covering, which forms a part of the sidewalk, defectively made and secured, and the city has notice of it, such owner and city are severally and jointly compellable to pay the damages to a person injured by breaking through the covering.³ And in all other cases within the same reason, a like liability of two or more parties — as, the municipal corporation and an individual — follows.⁴

§ 963. **Thirdly.** *After what Preliminaries the Liability to Third Persons attaches : —*

Negligence. — It must be borne in mind that, in the absence of purposed wrong, the ground of liability in these cases is negligence; for example, a city is answerable to a person injured by a defect in a street, because it neglected some duty relating thereto. And without negligence there is no liability.⁵ Thus, —

§ 964. **Latent Defect.** — For the ill consequence of latent defects in a way, existing without any default in the municipality, it is not responsible unless, after due notice and time,

¹ *Mahanoy v. Scholly*, 3 Norris, Pa. 136.

² *Ante*, § 518, 522, 529, 530, 602–607, 960; *Brooks v. Somerville*, 106 Mass. 271.

³ *Peoria v. Simpson*, 110 Ill. 294. And see *Stephani v. Brown*, 40 Ill. 428.

⁴ *Sides v. Portsmouth*, 59 N. H. 24; *Grove v. Kansas*, 75 Mo. 672; *Dotton v. Albion*, 50 Mich. 129; *Scranton v. Catterson*, 13 Norris, Pa. 202; *Barnes v. Newton*, 46 Iowa, 567; *Mansfield v. Moore*, 21 Ill. Ap. 326; *Kunz v. Troy*, 104 N. Y. 344; *Urquhart v. Ogdensburgh*, 97 N. Y. 238; *Taylor v. Yonkers*, 105 N. Y. 202; *Huntington v.*

Breen, 77 Ind. 29. And see *Moore v. Gadsden*, 93 N. Y. 12; *Rouse v. Somerville*, 130 Mass. 361; *Delory v. Canny*, 144 Mass. 445; *Moore v. Gadsden*, 87 N. Y. 84.

⁵ *Hume v. New York*, 47 N. Y. 639, 646; *Taylor v. Yonkers*, 105 N. Y. 202, 205; *Chicago v. Smith*, 48 Ill. 107; *Stafford v. Oskaloosa*, 57 Iowa, 748; *Chicago v. Glanville*, 18 Bradw. 308; *Goodale v. Portage Lake Bridge*, 55 Mich. 413; *Davis v. Central Vermont Rld.* 55 Vt. 84. This doctrine is in some States qualified by the terms of the statute. *Ward v. Jefferson*, 24 Wis. 342; *Goodnough v. Oshkosh*, 24 Wis. 549.

it neglects its duty of repair,¹ or unless it was discoverable on due care.² Again,—

§ 965. **Independent Causes.** — If, from causes for which the municipality is not responsible,—as, from the owner of a coal-hole under a sidewalk not keeping its cover properly secured,³ or from a stranger's removing a protecting barrier⁴ or doing some other like unlawful act,⁵ or from the operation of the elements of nature,⁶ —the way becomes unsafe, the municipality is not responsible for the consequences until, after notice or something equivalent thereto, it neglects to make the repairs, or unless in some other manner it is placed in default. But where, by any proper showing, its default therein appears, responsibility attaches.⁷ Further as to —

§ 966. **Notice.** — The notice which will charge the municipality need not be actual; facts from which it is inferable will suffice.⁸ A common case is where the jury infer it from the nature of the defect and the locality and duration of its existence.⁹ Some appear to hold, that notice to any inhabitant of a town,¹⁰ or member of a town board of supervisors,¹¹ or officer of a city,¹² though having no special authority over the ways, is notice to the town or city; but others deem that, to constitute actual notice, in distinction from what is in-

¹ *Chicago v. Murphy*, 84 Ill. 224; *Ry.* 83 Ill. 405; *Turner v. Indianapolis*, 96 Ind. 51; *Aurora v. Bitner*, 100 Ind. 396; *Nichols v. Minneapolis*, 33 Minn. 430; *Dotton v. Albion*, 57 Mich. 575; *Sikes v. Manchester*, 59 Iowa, 65.

² *Squires v. Chillicothe*, 89 Mo. 226; *Weisenberg v. Appleton*, 26 Wis. 56; *Burt v. Boston*, 122 Mass. 223.

³ *Hanscom v. Boston*, 141 Mass. 242.

⁴ *Klatt v. Milwaukee*, 53 Wis. 196; *Mullen v. Rutland*, 55 Vt. 77.

⁵ *Requa v. Rochester*, 45 N. Y. 129.

⁶ *Taylor v. Yonkers*, 105 N. Y. 202; *Ward v. Jefferson*, 24 Wis. 342, 343, 344. See *Blood v. Hubbardston*, 121 Mass. 233; *Jaquish v. Ithaca*, 36 Wis. 108.

⁷ *Lincoln v. Woodward*, 19 Neb. 259; *Cloughessey v. Waterbury*, 51 Conn. 405; *Schmidt v. Chicago, &c.*

⁸ *York v. Spellman*, 19 Neb. 357; *Hearn v. Chicago*, 20 Bradw. 249.

⁹ *Larmon v. District of Columbia*, 5 Mackey, 330; *Hall v. Fond du Lac*, 42 Wis. 274; *Woodbury v. District of Columbia*, 5 Mackey, 127; *Evansville v. Wilter*, 86 Ind. 414; *Washington v. Small*, 86 Ind. 462; *Colley v. Westbrook*, 57 Maine, 181; *Holt v. Penobscot*, 56 Maine, 15; *Cook v. Anamosa*, 66 Iowa, 427.

¹⁰ *Ham v. Wales*, 58 Maine, 222.

¹¹ *Jaquish v. Ithaca*, 36 Wis. 108.

¹² *Dewey v. Detroit*, 15 Mich. 307.

ferable as just stated, it must be to one having some authority or special duty in the premises.¹ Of course, —

§ 967. **Not required.** — In cases not within the reason requiring notice, none need be given. So that, for example, where a member of the police force, after painting the trap doors of a police station, carelessly propped them open, and a person fell upon them and was injured, the city was adjudged liable; the negligent act having proceeded from one of its own agents.² And this rule applies to all cases in which the default is, in contemplation of law, that of the municipality itself.³ Obviously, therefore, this doctrine of notice is wholly inapplicable to original defects in the way.

§ 968. **Fourthly.** *In what Condition the Way must be put and kept:* —

Differences. — It is impossible that this subject should admit of exact definings of particular things which may, may not, and must, be within the limits set apart for a public way. The statutes differ in their terms. The situations differ. And the unwritten law, which common usage⁴ and public sentiment create, as to the degree of excellence essential, is the most diverse element of all; though, in the interest of uniformity in our books, this branch of the law is practically and chiefly presided over by the jury.⁵ The result is that, even as the subject appears in our judicial reports, there are some differences among our States. Yet, in general terms, —

§ 969. **Doctrine defined.** — So much of the right of way — a strip narrower or wider or the whole — as the particular travel requires,⁶ must be wrought into; and otherwise made and kept

¹ Cook v. Anamosa, 66 Iowa, 427; Mass. 450; Manchester v. Ericsson, 105 Donaldson v. Boston, 16 Gray, 508, 511. U. S. 347; Merrill v. Hampden, 26 And see Billings v. Worcester, 102 Mass. Maine, 234; Washburn v. Woodstock, 329; Ryerson v. Abington, 102 Mass. 49 Vt. 503; Drew v. Sutton, 55 Vt. 526; Monies v. Lynn, 119 Mass. 273. 586; Beecher v. People, 38 Mich. 289.

² Carrington v. St. Louis, 89 Mo. 208.

³ Brooks v. Somerville, 106 Mass. 271; Johnson v. Salem Turnpike, 109 Mass. 522.

⁴ See Seeley v. Litchfield, 49 Conn. 134.

⁵ For example, Sullivan v. Oshkosh, 55 Wis. 508; Loan v. Boston, 106

⁶ Monongahela City v. Fischer, 1 Am. Pa. 9; Keyes v. Marcellus, 50 Mich. 439; Tritz v. Kansas, 84 Mo. 632; Seeley v. Litchfield, 49 Conn. 134; Moore v. Roberts, 64 Wis. 538; Crystal v. Des Moines, 65 Iowa, 502; Dickey v. Maine Telegraph, 46 Maine, 483.

in, a reasonably safe condition for such travel; any negligence¹ in which duty will create responsibility to persons injured thereby.² Some of the particulars are, —

§ 970. **Safety.** — In civil jurisprudence, where one to maintain an action must have suffered a special damage in distinction from an inconvenience common to the entire community,³ the leading rule is that the way must be made safe.⁴ This rule does not compel the corporation to violate the laws by removing things over which it has no control;⁵ but, within this limit, it creates responsibility for anything dangerous, if harm from it follows. Thus, —

§ 971. **Overhanging.** — A dweller upon a highway, who maintains a dilapidated house or other thing liable to fall on it, commits an indictable and abatable⁶ nuisance.⁷ If then the municipality, instead of removing a nuisance like this, — for example, a dangerous wall left by a fire,⁸ or an insecurely fastened show-board near the street,⁹ or an unsafe awning over the sidewalk,¹⁰ — suffers the danger to stand, and damage follows, it must recompense the person injured. A statute requiring the town to keep its ways in “good repair” seems to have been interpreted as exempting it in cases of this sort.¹¹ This doctrine is but a part of a wider one; namely, —

§ 972. **Outside of Way.** — Whenever there is danger to travel from anything beside or proximate to a highway, though not within its limits, the party responsible for its condition must remove the danger, or give warning, or erect proper guards.¹² One method is by a —

¹ Ante, § 963.

² *Rome v. Dodd*, 58 Ga. 238; *Centerville v. Woods*, 57 Ind. 192; *Mochler v. Shaftsbury*, 46 Vt. 580; *Albee v. Floyd*, 46 Iowa, 177; *Congdon v. Norwich*, 37 Conn. 414; *Atlanta v. Champe*, 66 Ga. 659; *Boulder v. Niles*, 9 Colo. 415; *Requa v. Rochester*, 45 N. Y. 129.

³ Ante, § 950; *Benjamin v. Storr*, Law Rep. 9 C. P. 400.

⁴ *Duffy v. Dubuque*, 63 Iowa, 171; *Estelle v. Lake Crystal*, 27 Minn. 243; *Madison v. Brown*, 89 Ind. 48; *Kelley*

v. Fond du Lac, 31 Wis. 179; *Talbot v. Taunton*, 140 Mass. 552; *McArthur v. Saginaw*, 58 Mich. 357.

⁵ *Flanders v. Norwood*, 141 Mass. 17.

⁶ Ante, § 429-432.

⁷ 2 Bishop Crim. Law, § 1275.

⁸ *Grogan v. Broadway Foundry*, 87 Mo. 321. But compare with *Kiley v. Kansas*, 87 Mo. 103.

⁹ *Langan v. Atchison*, 35 Kan. 318.

¹⁰ *Bohen v. Waseca*, 32 Minn. 176.

¹¹ *Taylor v. Peckham*, 8 R. I. 349.

¹² *Temperance Hall Assoc. v. Giles*, 4 Vroom, 260; *Bunch v. Edenton*, 90

§ 973. **Railings.** — In the absence of any statutory command, railings are required along public streets and bridges where, and only where, a prudent precaution dictates. There can be and is no rule truly more exact, though the cases contain some minuter speculations.¹

§ 974. **Lights,** — unless required by a statute or by-law, need not be maintained in the streets either of city or country. So that one who meets with an accident due to the darkness can claim nothing of the municipality.² Even an ordinance, directing the superintendent of streets to light them, has been interpreted as an affair of internal arrangement, giving third persons no right of action for injuries from its non-observance.³ Still, as precautions⁴ against special damages, lights have their legal as well as practical uses. Thus, if a pile of rubbish is left at night in the street, the city may or not be liable to one injured by it, according as a light is attached to it or not.⁵

§ 975. **Travelled Part of Way.** — The part of the way worked for travel, whether wider than necessary or not,⁶ or in any manner so left as to appear safe,⁷ must be put into a condition reasonably safe in fact, for use at all times both by night and by day.⁸ A hitching-post,⁹ stepping-stone,¹⁰ a post

N. C. 431 ; *Potter v. Castleton*, 53 Vt.

435 ; *Cartright v. Belmont*, 58 Wis.

370 ; *Drew v. Sutton*, 55 Vt. 586 ; 370.

Wheeler v. Westport, 30 Wis. 392.

¹ *Bronson v. Southbury*, 37 Conn.

199 ; *Barnes v. Chicopee*, 138 Mass. 67 ;

Haskell v. New Gloucester, 70 Maine,

305 ; *Beardsley v. Hartford*, 50 Conn.

529 ; *Daily v. Worcester*, 131 Mass.

452 ; *Hart v. Hudson River Bridge*, 84

N. Y. 56 ; *Willey v. Ellsworth*, 64

Maine, 57 ; *Gillespie v. Newburgh*, 54

N. Y. 468 ; *Ward v. New Haven*, 43

Conn. 148 ; *Bunch v. Edenton*, 90 N. C.

431 ; *Kelley v. Columbus*, 41 Ohio State,

263 ; *Veeder v. Little Falls*, 100 N. Y.

343.

² *Gaskins v. Atlanta*, 73 Ga. 746 ; 255.

Randall v. Eastern Rld. 106 Mass. 276 ;

Monongahela City v. Fischer, 1 Am.

Pa. 9.

³ *Lyon v. Cambridge*, 136 Mass. 419.

⁴ *Cartright v. Belmont*, 58 Wis.

370.

⁵ *King v. Cleveland*, 28 Fed. Rep.

835 ; *Monies v. Lynn*, 119 Mass. 273.

⁶ *Matthews v. Baraboo*, 39 Wis. 674.

⁷ *Saltmarsh v. Bow*, 56 N. H. 428 ;

Stark v. Lancaster, 57 N. H. 88 ; *Taub-*

man v. Lexington, 25 Mo. Ap. 218 ;

Aston v. Newton, 134 Mass. 507 ; *Hall*

v. Unity, 57 Maine, 529.

⁸ Ante, § 968 ; *Halpin v. Kansas*,

76 Mo. 335 ; *Watson v. Kingston*, 43

Hun, 367 ; *Etheridge v. Philadelphia*,

26 Fed. Rep. 43 ; *Marshall v. Ipswich*,

110 Mass. 522.

⁹ *Macomber v. Taunton*, 100 Mass.

255.

¹⁰ *Dubois v. Kingston*, 102 N. Y.

219.

to protect a shade-tree,¹ a gutter,² when severally proper in construction and location, being *quasi* necessities,— though each of them is a sort of obstruction, the permitting of no one of them will create liability in the municipality. Nor will the omission of precautions against an extraordinary storm, not within the anticipations of ordinary prudence, have this effect.³ So likewise the way need be made safe only for the sort of travel reasonably to be anticipated;⁴ as, in a country township, a bridge is not required to be of strength to support a steam threshing-machine of great weight, drawn by a traction engine.⁵

§ 976. **Frightening Horses.**— The most common of all the uses of a highway is to drive over it with horses attached to vehicles. As no one is entitled to take upon it a load of extraordinary weight and ask protection from the municipality, so no one can claim protection from the vice of an ill-broken or easily frightened horse. But an object on a highway calculated to frighten a horse of ordinary gentleness is a nuisance, and he who is damnified by such a horse taking fright at it may have his remedy against the municipality.⁶ It is but a truism to say that a way thus practically dangerous is not *safe* for this the commonest sort of travel.⁷ Yet we have some cases adverse.⁸

¹ Wellington v. Gregson, 31 Kan. 99; 2 Bishop Crim. Law, § 1277.

² Baker v. Madison, 56 Wis. 374.

³ Allen v. Chippewa Falls, 52 Wis. 430.

⁴ Ante, § 969; 2 Bishop Crim. Law, § 1276.

⁵ McCormick v. Washington, 2 Am. Pa. 185.

⁶ Clinton v. Howard, 42 Conn. 294; Macauley v. New York, 67 N. Y. 602; Nichols v. Athens, 66 Maine, 402. And see Acker v. Anderson, 20 S. C. 495; Edgerly v. Concord, 59 N. H. 341.

⁷ Ante, § 529, 970.

⁸ Fulton v. Rickel, 106 Ind. 501; Bemis v. Arlington, 114 Mass. 507. See Stone v. Hubbardston, 100 Mass. 49. The present is a good opportunity for introducing a specimen of —

Judicial Reasoning distinguished from the Reasonings of the Law.— The need of jurists, to develop the reasonings of the law in distinction from the incorrect or imperfect reasonings not unfrequently delivered from the bench (ante, § 839 and note, 843 and note, 908) may be illustrated by the following. In *Kingsbury v. Dedham*, 13 Allen, 186, 189, the question being whether or not a town was responsible for the consequences of frightening a horse by a pile of gravel in the middle of a highway, the court reasoned thus: "Upon careful consideration, it seems to us that it would be giving an unwarrantable interpretation to the statutes which impose on towns the duty of keeping the highways within their respective limits in safe and convenient

§ 977. **Sidewalks**, — for foot-travel, constitute parts of the ways.¹ And the municipality is under the same liabilities to persons injured through defects in them as in the other parts.²

condition, and render them responsible for injuries arising from defects or want of reasonable repairs, to hold that the existence of an object within the limits of a way, or the state of the surface of the road, which may cause horses to take fright, constitutes a culpable neglect. It would be quite impracticable for a city or town, however diligent and careful it might be, to conform to such a standard of duty. A small piece of white paper lying on the surface of a way in a bright sunlight, a discoloration of a patch of the road by moisture or other cause rendering it darker than other portions, a little tuft of hay or seaweed lying by the side of the travelled path, these and other similar objects which the highest diligence could not prevent or seasonably remove would expose towns to liability to actions for damages." Now, though this is not a very high specimen of judicial reasoning, it is such as we often meet with in the reports. Its contrast to anything which may be deemed the reasoning of the law is exceedingly sharp and steep. The law's reasonings may be compared to the timbers in a building; each one is fitted into the others, and together they constitute a self-supporting structure. But what is thus extracted from the report fits into nothing and nothing fits into it. Therefore, though it is wrought lumber, it is no part of the structure. Thus, one of the timbers in our legal edifice is, that the law does not concern itself about trifles. Ante, § 35, 36. But the "small piece of white paper lying on the surface of a way" and the "little tuft of hay" are things too trifling to fit into this or any other timber in our legal structure. The doctrine of negligence may be deemed one of the beams in our legal edifice. And by that doctrine the negligence must, to charge the party, have ac-

quired a standard degree. Ante, § 438-441. Since, therefore, timber must fit timber, the law's question would be, not whether the defendant should be held responsible for a want of care so minute as to become a practical impossibility, but whether the negligence in the case in hand had attained the law's standard. In other words, since the way was for travel by horse, and constructed by persons who ought to know the nature of the animal, the question was, not whether those who made and kept it were minutely negligent, but whether their negligence was such in kind and degree as to render it, by the fright it was adapted to produce, an unsafe way for horse and driver. And this question is not, in the opinion from which I have quoted, even attempted to be grappled with. So that its reasoning has no relation whatever to the reasoning of the law. Yet a very considerable proportion, though not all, and I shall not attempt to estimate how large a proportion, of the opinions in our reports are of this sort. And here we have a hint, not an unfolding, of the benefits which will result to our law from jurist writings, if the profession show such a purpose to encourage them as to bring jurists of the common law into existence.

¹ *Taber v. Grafmiller*, 109 Ind. 206.

² *Bloomington v. Bay*, 42 Ill. 503; *Durant v. Palmer*, 5 Dutcher, 544; *Thomas v. Brooklyn*, 58 Iowa, 438; *Cramer v. Burlington*, 45 Iowa, 627; *Furnell v. St. Paul*, 20 Minn. 117; *Glantz v. South Bend*, 106 Ind. 305; *Schroth v. Prescott*, 63 Wis. 652; *McMahon v. New York*, 33 N. Y. 642; *Davenport v. Ruckman*, 10 Bosw. 20; *Wallace v. New York*, 2 Hilton, 440. Otherwise in Michigan, *O'Neil v. Detroit*, 50 Mich. 133. See *Williams v. Grand Rapids*, 59 Mich. 51.

An insecure awning,¹ or an unfenced excavation in an adjoining lot,² may cast on the municipality liability for injuries following; so, not ordinarily, but in cases of special danger, openings from the sidewalk into adjacent basements, and the like, will have the same effect.³ As to, —

§ 978. *Ice on Sidewalk.* — In the winter, in our colder cities, it would be practically impossible for the governing power to keep all the sidewalks constantly free from the slippery conditions produced by ice and snow. And, whatever a city might profess, every prudent pedestrian would take his own precautions with him, thankful for any lack of occasion to use them. Therefore, as the general rule, cities and villages are not answerable to persons injured through this sort of defect,⁴ unless something else is added thereto.⁵ But when the accumulations have assumed dangerous shapes, and in various other circumstances where the municipality is evidently in fault, it will be held responsible.⁶

§ 979. *Fifthly. Permitting Steam and other Cars in the Ways:* —

Statutory Complications. — Any very helpful elucidation of this subject would involve wide unfoldings of differing multitudinous statutes, — quite impossible within our narrow space. In brief, —

§ 980. *Tramways,* — of whatever construction, if laid in a street, are in some degree an obstruction to its ordinary use; so that, however beneficial on the whole, they are not lawful without legislative sanction. There are some differences of opinion, but by what we may assume to be the just doctrine,

¹ Hume v. New York, 47 N. Y. 639.

² Bunch v. Edenton, 90 N. C. 431.
See Hubbell v. Yonkers, 104 N. Y. 434; Doyle v. Vinalhaven, 66 Maine, 348; Wenzlick v. McCotter, 87 N. Y. 122.

³ Fitzgerald v. Berlin, 64 Wis. 203; Day v. Mt. Pleasant, 70 Iowa, 193.

⁴ Smyth v. Bangor, 72 Maine, 249; Aurora v. Parks, 21 Ill. Ap. 459; Chase v. Cleveland, 44 Ohio State, 505; Grosenbach v. Milwaukee, 65 Wis. 31;

Cook v. Milwaukee, 27 Wis. 191; Cook v. Milwaukee, 24 Wis. 270.

⁵ Mauch Chunk v. Kline, 4 Out. Pa. 119; Kinney v. Troy, 108 N. Y. 567.

⁶ Broburg v. Des Moines, 63 Iowa, 523, 526; Dooley v. Meriden, 44 Conn. 117; Landolt v. Norwich, 37 Conn. 615; Hill v. Fond du Lac, 56 Wis. 242; Pomfrey v. Saratoga Springs, 104 N. Y. 459; Stafford v. Oskaloosa, 64 Iowa, 251; Griffin v. Sanbornton, 44 N. H. 246.

not even the corporation which has the care of the public ways can grant a valid permission to lay them, it must come from the legislature.¹ At the same time, in the case of an ordinary surface road, the tracks whereof do not exclude the common vehicles or the pedestrians, the new use is not a new servitude entitling the abutters to a fresh compensation.²

§ 981. **Elevated Railroads** — over the streets are a new use, permissible only on legislative authority and compensation to the abutters.³

§ 982. **Steam Railroads**, — of the ordinary sort, sometimes allowed in the streets, are likewise a new use, grantable only by the legislature, with compensation to the abutters.⁴ Now, —

§ 983. **Consequences**. — From these doctrines, from the diverse statutes, and from the combinings therewith of the ordinary rules of the common law, various consequences proceed. Ordinarily or generally, the municipality assigns to the railroad its location;⁵ but this does not render it liable to damages from its construction or use,⁶ or from the railroad's wrongs.⁷ Nor does it relieve the municipality of responsibility for what remains within its jurisdiction.⁸ On the

¹ *Reg. v. Train*, 2 B. & S. 640; *Perry v. New Orleans*, &c. Rld. 55 Ala. 413; *Davis v. New York*, 4 Kernan, 506; *Milbau v. Sharp*, 27 N. Y. 611; *Coleman v. Second Ave. Rld.* 38 N. Y. 201. See *Brown v. Duplessis*, 14 La. An. 842.

² *Elliott v. Fair Haven*, &c. Rld. 32 Conn. 579; *Hinchman v. Paterson Horse Rld.* 2 C. E. Green, 75; *Brooklyn, &c. Rld. v. Coney Island*, &c. Rld. 35 Barb. 364; *Porter v. North Missouri Rld.* 33 Mo. 128.

³ *Story v. New York Elev. Rld.* 90 N. Y. 122; *Lahr v. Metropolitan Elev. Ry.* 104 N. Y. 268; *Drucker v. Manhattan Ry.* 106 N. Y. 157; *Peyser v. Metropolitan Elev. Ry.* 13 Daly, 122, 12 Daly, 70.

⁴ *Imlay v. Union Branch Rld.* 26 Conn. 249; *Starr v. Camden*, &c. Rld. 4 Zab. 592; *Presbyterian Society v. Au-*

burn, &c. Rld. 3 Hill, N. Y. 567; *Falker v. New York*, &c. Ry. 17 Abb. N. Cas. 279; *Guess v. Stone Mountain Gr. &c. Ry.* 72 Ga. 320; *Gulf, &c. Ry. v. Fuller*, 63 Texas, 467; *Spencer v. Point Pleasant, &c. Rld.* 23 W. Va. 406; *Carson v. Central Rld.* 35 Cal. 325; *Wolfe v. Covington*, &c. Rld. 15 B. Monr. 404; *Seneca Road v. Auburn*, &c. Rld. 5 Hill, N. Y. 170; *Davis v. Chicago*, &c. Ry. 46 Iowa, 389.

⁵ *Merchants Union Barb Wire Co. v. Chicago*, &c. Ry. 70 Iowa, 105.

⁶ *Dillenberg v. Xenia*, 41 Ohio State, 207; *Olney v. Wharf*, 115 Ill. 519; *Frith v. Dubuque*, 45 Iowa, 406.

⁷ *Callahan v. Des Moines*, 63 Iowa, 705.

⁸ *Steubenville v. McGill*, 41 Ohio State, 235; *Aston v. McClure*, 6 Out. Pa. 322.

other hand, the railroad becomes answerable for its needless obstructions of the streets, resulting in damage.¹ And its use of the streets thus jointly with the common use by private persons casts upon it a high responsibility, demanding special care;² for the lack whereof, bringing injury to an individual, it must compensate him.³

§ 984. *Sixthly. Licensing other Obstructions:—*

Generally Unlawful — (Nuisance).— An obstruction in a highway is, in law language, a public nuisance.⁴ As such, it is an indictable wrong.⁵ And the general rule is, that the municipal corporation cannot by any license render it lawful, or relieve the doer or itself from civil responsibility therefor.⁶ Thus, —

§ 985. **Licensed Nuisance.**— A town licensed a tripod and fire for candy-making on a street, — calculated, as a jury afterward found, to frighten horses of ordinary gentleness. One's horse took fright thereat, doing damage, and the town was compelled to compensate him.⁷ Now, —

§ 986. **Temporary Necessity.**— More or less temporary obstructions of the streets are unavoidable. If they are reduced to the minimum of the particular necessity, and if in proper cases they receive the municipal license, no action is maintainable for any injury from them. The illustrations are such as come from the repair of the streets,⁸ the erection and repair of buildings beside them,⁹ the making of sewers and cellar drains,¹⁰ the laying of pipes for the domestic supply of water,¹¹

¹ *Bussian v. Milwaukee, &c. Ry.* 56 Wis. 325; *St. Louis, &c. Rld. v. Capps*, 72 Ill. 188.

² *Toledo, &c. Ry. v. Harmon*, 47 Ill. 298; *Illinois Cent. Rld. v. Hutchinson*, 47 Ill. 408.

³ *Robinson v. Western Pac. Rld.* 48 Cal. 409.

⁴ *Reg. v. Longton Gas Co.* 2 Ellis & E. 651; *Morton v. Moore*, 15 Gray, 573, 576; *Columbus v. Jaques*, 30 Ga. 506; *Gerrish v. Brown*, 51 Maine, 256. See, for the doctrine of private nuisance, ante, § 409-432.

⁵ 2 Bishop Crim. Law, § 1272.

⁶ Ante, § 748, 754, 980; *Winchester*

v. Capron, 63 N. H. 605; *Mikesell v. Durkee*, 34 Kan. 509; *Springfield v. Scheevers*, 21 Ill. Ap. 203.

⁷ *Rushville v. Adams*, 107 Ind. 475.

⁸ Ante, § 120; *Tift v. Jones*, 52 Ga. 538; *Hamilton v. Vicksburg, &c. Rld.* 119 U. S. 280; *Miller v. New York*, 109 U. S. 385; *Westliche Post Assoc. v. Allen*, 26 Mo. Ap. 181.

⁹ *Nolan v. King*, 97 N. Y. 565; *Clark v. Fry*, 8 Ohio State, 358.

¹⁰ *Clark v. Fry*, supra.

¹¹ *Smith v. Simmons*, 7 Out. Pa. 32; *Susquehanna Depot v. Simmons*, 2 Am. Pa. 384.

the lading and unlading of goods,¹ and many others. Yet each obstruction should be attended by the precautions which its special facts suggest; in the absence whereof, the corporation, the individual, or both will be answerable for the evil consequences.² Again, —

§ 987. **Special Occasions** — call for their special uses of the streets, and require and permit the municipality to make appropriate arrangements for them. So that, where municipal authorities caused a rope to be stretched across a street for the protection of the fire department in a public parade, a person injured by contact with it was adjudged not entitled to damages.³

§ 988. **Statutory Authority** — for an obstruction will, within a principle explained in an early chapter,⁴ relieve those permitting it from liability.⁵ And still the parties acting therein will be answerable for any negligence, or the infliction of needless harm.⁶

III. *The Owners and Dwellers along Public Ways.*

§ 989. **Extent of Ownership.** — The public, that uses the ways, is not, in its collective capacity, a tiller of the soil, a worker of mines, or a gatherer of harvests. Its need of land is limited to the easement for the particular purpose; so commonly it appropriates no more. And the presumption of the law is, that the abutters on a public way own the fee to the centre, while the public is the proprietor simply of the easement.⁷ And in the absence of restraining words,⁸ a deed of

¹ *Merritt v. Fitzgibbons*, 102 N. Y. 362; *Welsh v. Wilson*, 101 N. Y. 254; *Callanan v. Gilman*, 107 N. Y. 360.

² *Nolan v. King*, *supra*; *Estelle v. Lake Crystal*, 27 Minn. 243; *Grant v. Stillwater*, 35 Minn. 242; *Beardsley v. Swann*, 4 McLean, 333; *Stuart v. Havens*, 17 Neb. 211; *Jochem v. Robinson*, 66 Wis. 638; *Appleton v. Nantucket*, 121 Mass. 161; *Martinsville v. Shirley*, 84 Ind. 546.

³ *Simon v. Atlanta*, 67 Ga. 618.

⁴ *Ante*, § 111.

⁵ *Moore v. Lambeth Waterworks*, 17 Q. B. D. 462. And see *Irwin v. Great So. Telephone Co.* 37 La. An. 63.*

⁶ *Ante*, § 115; *Nichols v. Minneapolis*, 33 Minn. 430. And see *Memphis Bell Telephone Co. v. Hunt*, 16 Lea, 456; *Portland, &c. Rld. v. Deering*, 78 Maine, 61; *Keefe v. Sullivan County Rld.* 63 N. H. 271.

⁷ *Taylor v. Armstrong*, 24 Ark. 102; *Rice v. Worcester*, 11 Gray, 283, note;

⁸ *Gaylord v. King*, 142 Mass. 495; *Champlin v. Pendleton*, 13 Conn. 23.

land on a street¹ or river² carries the fee to the centre. So a dedication or a prescription for a highway gives to the public the easement only, not the fee.³ It is the same also where land for a way is taken by the right of eminent domain.⁴ Of course, in most and perhaps all of these cases, this conclusion may be reversed by express words or intendment in the deed or act of transfer, so that the fee will not be in the adjoining owner.⁵ Then such owner will take an easement in the land over which is the way, for his special use in connection with the use by the public.⁶ So that, in either event, he will have therein rights superior to those of the public at large.⁷ Consequently,—

§ 990. *Abutter's Rights.* — An abutter, assuming him to own the fee, may get out of or take from the land whatever he can, so long as he does no injury to the way.⁸ He is entitled to the grass and all else that grows on it.⁹ The minerals under it are his, and he may work the mines, yet not to interfere with the public use.¹⁰ Any private person who takes away earth from a highway,¹¹ or for his individual benefit

Van Amringe v. Barnett, 8 Bosw. 357; *Cooke v. Green*, 11 Price, 736; *Holmes v. Bellingham*, 7 C. B. N. s. 329, 6 Jur. N. s. 534; *West Covington v. Freking*, 8 Bush, 121; *Willoughby v. Jenks*, 20 Wend. 96; *Cortelyou v. Van Brundt*, 2 Johns. 357, 363.

¹ *Berridge v. Ward*, 10 C. B. N. s. 400, 7 Jur. N. s. 876; *Reg. v. Board of Works*, 4 B. & S. 526, 547, 548; *Witter v. Harvey*, 1 McCord, 67; *Hollenbeck v. Rowley*, 8 Allen, 473.

² *Day v. Pittsburg, &c. Rld.* 44 Ohio State, 406; *Shirley v. Bishop*, 67 Cal. 543.

³ *Lade v. Shepherd*, 2 Stra. 1004; *Gidney v. Earl*, 12 Wend. 98.

⁴ *Charleston Rice Mil. Co. v. Bennett*, 18 S. C. 254; *Holden v. Shattuck*, 34 Vt. 336; *Baker v. Shephard*, 4 Fost. N. H. 208; *Harris v. Elliott*, 10 Pet. 25; *Cole v. Drew*, 44 Vt. 49; *Pittsburgh, &c. Rld. v. Bruce*, 6 Out. Pa. 23.

⁵ *Smith v. Slocomb*, 11 Gray, 280;

Yates v. Hathaway, 15 Johns. 447; *Boston v. Richardson*, 13 Allen, 146; *Grose v. West*, 7 Taunt. 39; *Hughes v. Providence, &c. Rld.* 2 R. I. 493; *Mott v. Mott*, 68 N. Y. 246; *Banks v. Ogden*, 2 Wal. 57; *Des Moines v. Hall*, 24 Iowa, 234; *Harlow v. Rogers*, 12 Cush. 291.

⁶ *Story v. New York Elev. Rld.* 90 N. Y. 122; *Lahr v. Metropolitan Elev. Ry.* 104 N. Y. 268; *Drucker v. Manhattan Ry.* 106 N. Y. 157.

⁷ *Ib.*; *Brakken v. Minneapolis, &c. Ry.* 29 Minn. 41.

⁸ *O'Linda v. Lothrop*, 21 Pick. 292, 297; *Reg. v. Mathias*, 2 Fost. & F. 570; *Stackpole v. Healy*, 16 Mass. 33.

⁹ *Woodruff v. Neal*, 28 Conn. 165; *Cole v. Drew*, 44 Vt. 49; *Adams v. Emerson*, 6 Pick. 57; *Lyman v. Arnold*, 5 Mason, 195.

¹⁰ *West Covington v. Freking*, 8 Bush, 121.

¹¹ *Gidney v. Earl*, 12 Wend. 98.

occupies any part of it,¹ or ploughs it,² or removes from it trees or herbage not amounting to a nuisance,³ or places anything upon it,⁴ or erects any structure overhanging it,⁵ commits a trespass on the owner of the servient land, for which he is liable in the same manner as though it was unincumbered by the way.⁶ But the municipality making or repairing it may use in such construction or repair the earth, stones, and gravel taken from any part, from the surface down to grade, upon the same or any other⁷ part, without regard to the ownership of the fee at the several places.⁸ Yet to obtain materials for such use it must not dig below grade, even though it fills the spaces with other soil.⁹ And whatever is not thus rightfully appropriated to the way itself belongs, as well against the municipality as a private person, to the owner of the fee.¹⁰ An apt illustration is afforded by standing trees: the municipality may have their use for the shade and ornament of the way;¹¹ but they belong to the owner of the fee, and, when rejected by those having the care of the street, he is entitled to remove and take them to his own use.¹²

§ 991. **Abutters not Owning Fee.** — The precise nature and extent of the special easement rights of an abutter who does not own the fee of the way,¹³ cannot be fully stated on authority; the case not being common, and the question not having

¹ *Chester v. Alker*, 1 Bur. 133.

² *Robbins v. Borman*, 1 Pick. 122.

³ *Phifer v. Cox*, 21 Ohio State, 248.

⁴ *Lewis v. Jones*, 1 Barr, 336.

⁵ Ante, § 417; *Codman v. Evans*, 5 Allen, 308. See *Jenks v. Williams*, 115 Mass. 217.

⁶ *Munson v. Mallory*, 36 Conn. 165; *Hollenbeck v. Rowley*, 8 Allen, 473.

⁷ But see *Macon v. Hill*, 58 Ga. 595.

⁸ Ante, § 874; *Denniston v. Clark*, 125 Mass. 216; *Upham v. Marsh*, 128 Mass. 546. **Timber.** — I should say, in the absence of specific rulings, that the maker or repairer might use also the timber, — as, for example, in corduroying or bridging, — but *Baker v. Shephard*, 4 Fost. N. H. 208, appears to be opposed.

⁹ *Robert v. Sadler*, 104 N. Y. 229.

¹⁰ *Krueger v. Palatine*, 20 Bradw. 420; *Higgins v. Reynolds*, 31 N. Y. 151, 156; *Leonard v. Cincinnati*, 26 Ohio State, 447.

¹¹ Yet even this is denied, except where they are purchased, or taken by the right of eminent domain. *Lancaster v. Richardson*, 4 Lans. 136. Still it seems to me that the right of way includes the right to make it pleasant by shade, as well as smooth to the foot of the traveller. And I think that, in most of our States, this is the practical fact of the law, however it may have originated. And see *Everett v. Council Bluffs*, 46 Iowa, 66.

¹² *Wellman v. Dickey*, 73 Maine, 29; *Clark v. Dasso*, 34 Mich. 86. But see *Castleberry v. Atlanta*, 74 Ga. 164.

¹³ Ante, § 989.

often arisen. Plainly he is not entitled to forbid the removal, by public command, of a tree in the street, though set out by himself.¹ Nor has he any other interest in the soil, viewed simply as a producer of what has value. But he may forbid perversions of the uses of the way, its unreasonable obstruction, the shutting of it up, the cutting off of his light, and other like nuisances.² And, in just reason, these special easements of his should be construed to be precisely the same with those of the dwellers who own the fee to the centre; the difference being that they, and not he, may enjoy also what the land produces or sustains. Thus, if the owner of the fee may ever use the untravelled part of a public way for the storage of lumber and carriages³ or the maintaining of hay-scales, certainly the abutter with simply the easement cannot.⁴ Leaving now this sort of distinction, —

§ 992. **Access** — to the street from one's premises and from the street to them, sometimes termed ingress and egress, is a right, or easement, in all who dwell thereon. The municipality is not required to construct a path for this purpose, but to permit it to be made and kept open by the owner. To obstruct him herein to his detriment is actionable.⁵ The wrong assumes various forms; thus, —

§ 993. **Instances.** — The street in front of one's premises cannot, without his consent, be made a stand for hacks.⁶ Any needless or persistent obstruction to the passing of customers to and from the shop of a trader;⁷ a puppet-show in

¹ Gaylord v. King, 142 Mass. 495.

² Story v. New York Elev. Rld. 90 N. Y. 122, and other cases cited ante, § 989; Peyser v. Metropolitan Elev. Ry. 13 Daly, 122; Kings County Fire Ins. Co. v. Stevens, 101 N. Y. 411; Mahady v. Bushwick Rld. 91 N. Y. 148.

³ Judd v. Fargo, 107 Mass. 264; Chamberlain v. Enfield, 43 N. H. 356; Piollet v. Simmers, 10 Out. Pa. 95; Palmer v. Silverthorn, 8 Casey, Pa. 65; Gerring v. Barfield, 16 C. B. n. s. 597.

⁴ Emerson v. Babcock, 66 Iowa, 257.

⁵ Goodin v. Des Moines, 55 Iowa, 67;

Brakken v. Minneapolis, &c. Ry. 29 Minn. 41; Mahady v. Bushwick Rld. 91 N. Y. 148; Burnham v. Boston, 10 Allen, 290; Park v. Chicago, &c. Ry. 43 Iowa, 636; Lahr v. Metropolitan Elev. Ry. 104 N. Y. 268; Textor v. Baltimore, &c. Rld. 59 Md. 63; Frankle v. Jackson, 30 Fed. Rep. 398; Smith v. Leavenworth, 15 Kan. 81; Orme v. Richmond, 79 Va. 86.

⁶ McCaffrey v. Smith, 41 Hun, 117; Slater v. Swann, 2 Stra. 872.

⁷ Wilkes v. Hungerford Market, 2 Bing. N. C. 281; Williams v. Tripp, 11 R. I. 447.

a window opposite, drawing crowds that block the approaches to the shop;¹ a railroad track, laid in front of one's premises,² or telephone poles there erected,³ without due authorization; suffering street or other cars to remain an unreasonable time before a dwelling-house;⁴ casting snow in heaps, and leaving it too long, in front of one's premises;⁵ permitting the street to be used as a market-place;⁶ — each of these is a private nuisance, actionable or abatable by injunction, or both, according to the circumstances. Some of them are not only obstructions to the right of ingress and egress, but are wrongs on other grounds likewise.

§ 994. **Excavations.** — The responsibilities of the fee-owner for excavations outside of street-lines, whereby another is injured, depend chiefly on principles stated in a preceding chapter.⁷ So long as he does not impair the due lateral support,⁸ he may dig up his unincumbered soil to any extent he pleases, taking proper precautions.⁹ And he owes no duty of precaution to a voluntary trespasser, who, therefore, is not entitled to damages for any injury therefrom.¹⁰ But to an involuntary trespasser, harmed by an unguarded excavation so near the street that one might fall into it while passing along with ordinary circumspection, he is answerable;¹¹ for he owed to him the duty to seek his own interests with a careful regard for the welfare of others.¹² And it is the same where the

¹ *Jaques v. National Exhibit Co.* 15 Abb. N. Cas. 250. See *Gallagher v. Dodge*, 48 Conn. 387; *People v. New York*, 18 Abb. N. Cas. 123; *Elias v. Sutherland*, 18 Abb. N. Cas. 126.

² *Blesch v. Chicago, &c. Ry.* 43 Wis. 183; *Bell v. Edwards*, 37 La. An. 475.

³ *Broome v. New York, &c. Telephone Co.* 15 Stew. Ch. 141.

⁴ *Angel v. Pennsylvania Rld.* 11 Stew. Ch. 58; *Pennsylvania Rld. v. Angel*, 14 Stew. Ch. 316. And see *Hopkins v. Western Pac. Rld.* 50 Cal. 190.

⁵ *Prime v. Twenty-third Street Rld.* 1 Abb. N. Cas. 63.

⁶ *McDonald v. Newark*, 15 Stew. Ch. 136; *Lutterloh v. Cedar Keys*, 15 Fla. 306.

⁷ Ante, § 845-854.

⁸ Ante, § 905-913; *Milburn v. Fowler*, 27 Hun. 568.

⁹ *Buesching v. St. Louis Gas-light Co.* 73 Mo. 219; *Howland v. Vincent*, 10 Met. 371.

¹⁰ *Hardcastle v. South Yorkshire, &c. Co.* 4 H. & N. 67, 5 Jur. N. s. 150; *Hounsell v. Smyth*, 7 C. B. N. s. 731, 6 Jur. N. s. 897; *Binks v. South Yorkshire, &c. Co.* 3 B. & S. 244.

¹¹ *Ib.*; *Beck v. Carter*, 68 N. Y. 283; *Hadley v. Taylor*, Law Rep. 1 C. P. 53; *Barnes v. Ward*, 9 C. B. 392, 14 Jur. 334; *Wettor v. Dunk*, 4 Fost. & F. 298; *Hayes v. Michigan Cent. Rld.* 111 U. S. 228, 235, 236.

¹² Ante, § 104, 115.

owner has held out inducements or enticements, or given the public or individuals a permission, to go to the excavated place;¹ or, where cattle, that are injured, are lawfully² at large;³ in which cases the excavation must be fenced or guarded.⁴ Of course,—

§ 995. **Within Street.**—For the fee-owner's unlawful excavations within the street, followed by injury, he is responsible like any other person. An insufficiently secured coal-hole in the sidewalk is an example.⁵ And where one who was digging a coal-cellar under the sidewalk left the work so insufficiently protected that a rain flooded, through it, a neighbor's cellar, damaging goods therein, he was compelled to compensate their owner.⁶ So—

§ 996. **Other Trespass.**—The abutter is in like manner answerable for any other form of trespass on the right of way.⁷ Thus, if he so constructs his roof that it casts ice and snow on a passer-by,⁸ or in violation of a by-law suspends a sign and it falls on a person in the street,⁹ or keeps his building on the way in a condition so unsafe that it does damage,¹⁰ or so carelessly unloads¹¹ or piles¹² things on the sidewalk that a pedestrian is injured, he must make compensation for the loss or suffering inflicted.

§ 997. **Grade of Street.**—As the ways are for the public, it is impossible the lot-owners should decide, each for himself, what the grade in front of their respective estates shall be; for it would result in ascents and descents so steep as to ren-

¹ Ante, § 848, 849, 853, 854; Beck v. Carter, supra; Graves v. Thomas, 95 Ind. 361; Crogan v. Schiele, 53 Conn. 186.

² Ante, § 845.

³ Haughey v. Hart, 62 Iowa, 96; Jones v. Nichols, 46 Ark. 207.

⁴ Buesching v. St. Louis Gas-light Co., 73 Mo. 219.

⁵ Jennings v. Van Schaick, 13 Daly, 438; Calder v. Smalley, 66 Iowa, 219; Dalay v. Savage, 145 Mass. 38; Irvin v. Fowler, 5 Rob. N. Y. 482.

⁶ Nelson v. Godfrey, 12 Ill. 20.

⁷ Mairs v. Manhattan Real Estate

Assoc. 89 N. Y. 498, 503, 505; Neff v. Paddock, 26 Wis. 546.

⁸ Shipley v. Fifty Associates, 106 Mass. 194; Garland v. Towne, 55 N. H. 55; Walsh v. Mead, 8 Hun, 387. See Moore v. Gadsden, 87 N. Y. 84, 87, 88.

⁹ Salisbury v. Herchenroder, 106 Mass. 458.

¹⁰ Mullen v. St. John, 57 N. Y. 567; Vincett v. Cook, 6 Thomp. & C. 562, 4 Hun, 318.

¹¹ Gleason v. Amsdell, 9 Daly, 393.

¹² Maddox v. Cunningham, 68 Ga. 431.

der them impassable. Therefore the grade is, because it must be, determined by the proper official persons. And in most of our States the same rule is judicially applied to subsequent repairs; leaving the abutters without remedy for harm from a change of grade, except perhaps where it is made maliciously.¹ In Ohio, the contrary is maintained, to the extent of giving compensation to lot-owners for injuries from any change of an established grade, and from other analogous improvements.² While the majority rule seems to be an inevitable deduction from common-law principles, there is often a high practical justice in the Ohio doctrine, and it or something like it has been gradually wrought out in various other States, by statutes, constitutional provisions, or municipal by-laws.³ And, in all, negligent grading is a ground for damages.⁴

¹ *Callendar v. Marsh*, 1 Pick. 418; *Dore v. Milwaukee*, 42 Wis. 108; *Hendershott v. Ottumwa*, 46 Iowa, 658; *Macon v. Hill*, 58 Ga. 595; *Smith v. Washington*, 20 How. U. S. 135; *British Cast-plate Manuf. v. Meredith*, 4 T. R. 794. The cases are very numerous. See a collection of them in 2 Dil. Mun. Corp. § 783, note.

² In *Cohen v. Cleveland*, 43 Ohio State, 190, 193, Okey, J. states: "Injuries resulting from the change of established grades in streets, though made in accordance with the statute, and without negligence or malice, and other injuries of a kindred character, have been held to afford ground for the recovery of damages against municipal corporations. [Referring to *Rhodes v. Cleveland*, 10 Ohio, 159; *McCombs v. Akron*, 15 Ohio, 474, 479; s. c. nom. *Akron v. McComb*, 18 Ohio, 229; *Crawford v. Delaware*, 7 Ohio State, 459; *Youngstown v. Moore*, 30 Ohio State, 133; *Keating v. Cincinnati*, 38 Ohio State, 141. And see *Little Miami Rld. v. Naylor*, 2 Ohio State, 235; *Cincinnati, &c. St. Ry. v. Cumminsville*, 14 Ohio State, 523; *Richards v. Cincinnati*, 31 Ohio State, 506; *Story v. New York Elev. Rld.* 90 N. Y. 122.] This court has, how-

ever, constantly acknowledged that *McCombs v. Akron*, and cases following it, are a departure from the current of authority elsewhere; and, although these cases have not found favor with the judges delivering the opinions in *Radcliff v. Brooklyn*, 4 Comst. 195; *Hill v. Boston*, 122 Mass. 344, 378; *Alexander v. Milwaukee*, 16 Wis. 247, 256; *Transportation Co. v. Chicago*, 99 U. S. 635, we are entirely content with the doctrine, and would not change it if we could. But the justice of the Ohio rule, the firmness with which it has been adhered to for nearly half a century, and the manner in which it is recognized and enforced in our statutes, have established the doctrine as a rule of property, and it is now too late to inquire whether *McCombs v. Akron* was properly decided. In other States, the same rule is in part or wholly adopted by constitutional or statutory provision."

³ Some of the later cases are *Kelly v. Baltimore*, 65 Md. 171; *Nashville v. Nichol*, 3 Baxter, 338; *Given v. Des Moines*, 70 Iowa, 637; *Meyer v. Fromm*, 108 Ind. 208; *Campbell v. Philadelphia*, 12 Ont. Pa. 300.

⁴ Ante, § 751; *Field v. West Orange*, 9 Stew. Ch. 118; *West Orange*

§ 998. **Lateral Support.** — while due from the adjoining land-owner to the way,¹ is, in reason, equally due from the way to the land-owner. Therefore it has been adjudged that, if the lateral support is in grading removed, he is entitled to damages,² though there are cases to the contrary.³ The rule of the law in other things being so,⁴ there is no necessity for an exception in favor of public ways. On the other side, —

§ 999. **Support for Way.** — When a public way has been laid out at a given width, if the authorities so pile the earth in making it that it finds support on unappropriated land adjoining, they are responsible to the owner.⁵

§ 1000. **Water.** — The rules regulating watercourses and surface waters⁶ extend to public ways. The builder of the way will be responsible, except as against the act of God,⁷ if he obstructs or diverts a watercourse to the injury of another;⁸ but it is commonly otherwise of surface water.⁹

§ 1001. **Discontinuance.** — If a public way is discontinued, the owner of the fee has back his land divested of the easement.¹⁰ And one who has used the way, however much, cannot retain his right to it as a private way.¹¹

v. Field, 10 Stew. Ch. 600; *Orme v. Richmond*, 79 Va. 86; *Talbot v. Taunton*, 140 Mass. 552; *North Vernon v. Voegler*, 103 Ind. 314; *Clemence v. Auburn*, 66 N. Y. 334; *Princeton v. Gieske*, 93 Ind. 102; *Gray v. Knoxville*, 85 Tenn. 99.

¹ Ante, § 994.

² *Dyer v. St. Paul*, 27 Minn. 457; *Meares v. Wilmington*, 9 Ire. 73; *Keating v. Cincinnati*, 38 Ohio State, 141.

³ On this side of the question, *Dillon* (2 Mun. Corp. § 783, note) cites *Taylor v. St. Louis*, 14 Mo. 20; *St. Louis v. Gurno*, 12 Misso. 414; *Rome v. Omberg*, 28 Ga. 46.

⁴ Ante, § 905-913.

⁵ *Mayo v. Springfield*, 136 Mass. 10.

⁶ Ante, § 888-903.

⁷ Ante, § 166-172.

⁸ *Manning v. Lowell*, 130 Mass. 21; *Union Trust Co. v. Cuppy*, 26 Kan. 754; *Stodghill v. Chicago, &c. Rld.* 43 Iowa,

26; *Kellogg v. Thompson*, 66 N. Y. 88; *McClure v. Red Wing*, 28 Minn. 186; *Wayland v. St. Louis, &c. Ry.* 75 Mo. 548.

⁹ *Keith v. Brockton*, 136 Mass. 119; *Morris v. Council Bluffs*, 67 Iowa, 343; *Gould v. Booth*, 66 N. Y. 62; *Moyer v. New York Cent. &c. Rld.* 88 N. Y. 351; *Abbott v. Kansas City, &c. Rld.* 83 Mo. 271; *Waters v. Bay View*, 61 Wis. 642; *McOskey v. Burrell*, 55 Ind. 425; *Noble v. St. Albans*, 56 Vt. 522; *Rutherford v. Holley*, 105 N. Y. 632; *Parker v. Nashua*, 59 N. H. 402; *Freburg v. Davenport*, 63 Iowa, 119; *Gilfeather v. Council Bluffs*, 69 Iowa, 310.

¹⁰ *Pittsburgh, &c. Rld. v. Bruce*, 6 Out. Pa. 23; *Van Amringe v. Barnett*, 8 Bosw. 357; *Paul v. Carver*, 12 Harris, Pa. 207.

¹¹ *Glaze v. Western, &c. Rld.* 67 Ga. 761.

IV. *Third Persons Injuring a Public Way.*

§ 1002. **Liability to Private Person.** — Whoever, by any obstruction or other injury to a public way, brings a special harm¹ to another, must compensate him, whether the latter had an election to proceed against the municipality or not.² And a like liability extends to one who needlessly obstructs a navigable stream.³ And, —

§ 1003. **To Municipality.** — In these cases, if there is a municipality or other party also liable, it may after paying the damages recover them of him.⁴ Or if, when he has injured a street, he refuses to repair it, whereupon the municipality does the work, he must refund the cost.⁵

§ 1004. **Illustrations** — of these principles are multitudinous and obvious. A reader specially in need of them will find sufficient in the cases already cited to this sub-title, and in those appended to this section.⁶

V. *The Rights and Wrongs in Using Public Ways.*

§ 1005. **Variable.** — The adaptations of the common law to constantly changing circumstances and affairs are admirably

¹ Ante, § 950 ; *Winterbottom v. Works*, 25 Mo. Ap. 527 ; *Jewett v. Derby*, Law Rep. 2 Ex. 316. *Gage*, 55 Maine, 538.

² *Potter v. Menasha*, 30 Wis. 492 ; *Trowbridge v. Forepaugh*, 14 Minn. 133 ; *Wright v. Saunders*, 65 Barb. 214, 219 ; *Western Union Tel. v. Eyser*, 2 Colo. 141 ; *Pittsburgh, &c. Ry. v. Sponier*, 85 Ind. 165 ; *James v. Hayward*, Cro. Car. 184 ; *Goelet v. Newport*, 14 R. I. 295 ; *McCoy v. Philadelphia, &c. Rld.* 5 Houst. 599 ; *Marriott v. Stanley*, 1 Scott N. R. 392 ; *Matthews v. Missouri Pac. Ry.* 26 Mo. Ap. 75 ; *Sexton v. Zett*, 44 N. Y. 430 ; *Branch v. Libbey*, 78 Maine, 321 ; *Hundhausen v. Bond*, 36 Wis. 29 ; *Smith v. Matteson*, 41 Hun, 216 ; *Ball v. Armstrong*, 10 Ind. 181 ; *Glasby v. Morris*, 3 C. E. Green, 72 ; *Sheedy v. Union Press Brick Works*, 25 Mo. Ap. 527 ; *Jewett v. Gage*, 55 Maine, 538.

³ *Gifford v. McArthur*, 55 Mich. 535 ; *Blanchard v. Western Union Tel.* 60 N. Y. 510.

⁴ Ante, § 535 ; *Sioux City v. Weare*, 59 Iowa, 95.

⁵ *Centerville v. Woods*, 57 Ind. 192.

⁶ *Fay v. Kent*, 55 Vt. 557 ; *Banks v. Highland Street Ry.* 136 Mass. 485 ; *Boston v. Gray*, 144 Mass. 53 ; *Julia Building Assoc. v. Bell Telephone*, 88 Mo. 258 ; *Cahill v. Layton*, 57 Wis. 600 ; *Beauchamp v. Saginaw Min. Co.* 50 Mich. 163 ; *Turner v. Buchanan*, 82 Ind. 147 ; *Gwinnell v. Eamer*, Law Rep. 10 C. P. 658 ; *Harris v. Mobbs*, 3 Ex. D. 268.

illustrated in the subject of this sub-title. From the unwrought road-beds in our native forests and unploughed prairies to the granite-paved streets in the denser parts of our large cities, the former resting on unbroken earth and the latter on a honeycomb of sewers, water-pipes, gas-pipes, and pipes for electric wires, we have public ways of every variety, each fitted for a travel and for collateral uses differing from the rest. For all which, and sufficient for all, the common law has its one flexible rule, working out its results in numberless minor forms; namely, —

§ 1006. **Defined.** — The primary use of the public ways is the passing over them of persons with their vehicles and effects;¹ and, resulting therefrom, the stoppings for loading and unloading, and such other temporary pauses as convenience in the use requires.² Secondarily to which, the way may be employed for any other purposes of public or semi-public benefit which do not seriously interfere with its primary use, and for supplying to individuals the necessities which arise from abutting thereon. Various illustrations of this doctrine appear in the foregoing sub-titles,³ others will here follow. Thus, —

§ 1007. **Overloading.** — When a way has been made safe for the uses reasonably to be expected of it,⁴ one is not permitted to take upon it an unusual load too heavy. If he does, and thereby injures it, he is indictable;⁵ or, if harm comes to him, the municipality responsible for its condition cannot be compelled to recompense him.⁶ Of course, —

§ 1008. **What Vehicles.** — All the ordinary vehicles, drawn by horse or other like power, are allowable. Precisely how far steam may be substituted is less accurately defined, but it is not absolutely excluded.⁷ Bicycles, tricycles, and veloci-

¹ *Smith v. Leavenworth*, 15 Kan. Crim. Law, § 1272, 1274, 1276, 1277, 81; *The State v. Buckner*, Phillips, 1280. N. C. 558.

⁴ Ante, § 969.

² *Britton v. Cummington*, 107 Mass. 347; *Donoho v. Vulcan Iron Works*, 75 Mo. 401; *Hundhausen v. Bond*, 36 Wis. 29.

⁵ 2 Bishop Crim. Law, § 1276; Com. Dig. Chimin, A, 3.

⁶ *Fulton Iron, &c. Works v. Kimball*, 52 Mich. 146.

⁸ And see and compare 2 Bishop

⁷ *Macomber v. Nichols*, 34 Mich.

pedes, things also of modern invention, appear to be permissible when used in a manner not dangerous or inconvenient to the public in its other uses of the way.¹ And, like other vehicles, they may in their running be regulated by statutes and by-laws.²

§ 1009. **Travel or Play** — (“**Traveller**”). — Some of the statutes, defining the duty of repair, specify, to quote as an example the words in Massachusetts, that the way shall be so kept as to be “reasonably safe and convenient for travellers, with their horses, teams, and carriages, at all seasons of the year.”³ By construction whereof, the corporation owes no duty to people other than travellers; so that a child or other person, using the street simply as a play-ground, has no right of action against it for any injury suffered from a want of repair.⁴ But a meaning wider than in some other statutes⁵ is given to the word “traveller;” as, taking a single step from one’s door upon the sidewalk to witness a passing procession is a travelling, whence arises the statutory protection.⁶ And the ulterior purpose of the travelling is not material.⁷ But horse-racing on the street is not, within this statute, travelling, even where it is not unlawful.⁸ The reader should bear in mind that this exposition relates simply to the liability of the municipal corporation under this statute; individuals and most corporations owe a duty of carefulness to everybody.⁹ So that, in localities where this statute prevails, persons negligently injuring children playing on the public ways, or other persons within the like reasons,¹⁰ incur the same liabilities as though they were travelling. Leaving these special terms, —

212; *Moses v. Pittsburgh, &c. Rld.* 21 Ill. 516; *Parkyn v. Preist*, 7 Q. B. D. 313.

¹ *Taylor v. Goodwin*, 4 Q. B. D. 228; *Parkyn v. Preist*, *supra*; *Williams v. Ellis*, 5 Q. B. D. 175; *Purple v. Greenfield*, 138 Mass. 1.

² *The State v. Yopp*, 97 N. C. 477.

³ Mass. Pub. Stats. c. 52, § 1.

⁴ *Blodgett v. Boston*, 8 Allen, 237; *Tighe v. Lowell*, 119 Mass. 472; *Stinson v. Gardiner*, 42 Maine, 248; *Hawes v. Fox Lake*, 33 Wis. 438.

⁵ *Bishop Stat. Crimes*, § 788 a.

⁶ *Varney v. Manchester*, 58 N. H. 430. And see *Bliss v. South Hadley*, 145 Mass. 91; *Cummings v. Center Harbor*, 57 N. H. 17. Compare with *Leslie v. Lewiston*, 62 Maine, 468.

⁷ *Strong v. Stevens Point*, 62 Wis. 255.

⁸ *McCarthy v. Portland*, 67 Maine, 167. See *Sowerby v. Wadsworth*, 3 Fost. & F. 734.

⁹ *Ante*, § 115, 150, 179, 436, 724.

¹⁰ *Bigelow v. Reed*, 51 Maine, 325.

§ 1010. **Same Generally.** — In States wherein there are no such restrictive statutory terms, it is sufficient that the person injured was using the street for any lawful purpose. Within which rule, playing there is not deemed unlawful.¹ And still it is by some held that a city is not responsible for an accidental injury, through a defect in the way, to one employing it “for purposes wholly foreign to its legitimate objects. . . . Thus, if a circus-man or a juggler monopolizes a space in a public street for exhibiting his show, and while so doing suffers an injury resulting from a defective construction of the highway, he cannot therefore have redress against the municipality.” And a mere playing in the street, connected with nothing more legitimate, has been thought to fall within this distinction.² Another distinction relates to the —

§ 1011. **Rights of Abutters.** — It is believed that, as against an abutter, especially one owning the fee,³ no person is entitled to use the way for any purpose not connected with travel. To stop on the sidewalk in front of a man's house, even for a brief time, employing toward him abusive and insulting language, is an actionable wrong and otherwise a trespass; and it is the same if “a strolling musician stops in front of a gentleman's house, and plays a tune or sings an obscene song under his window.”⁴ And within this distinction the using of a street before a dwelling-house or shop as a play-ground, or hawking-ground, or show-ground, against the dissent of the occupant of the building, is a trespass for which he has the various remedies of the law.

§ 1012. **Contributory Negligence.** — In suits against municipal corporations for injuries from negligently kept ways, the vital issue is oftenest that of contributory negligence.⁵ And

¹ *McGuire v. Spence*, 91 N. Y. 303, 306; *Chicago v. Keefe*, 114 Ill. 222; *Indianapolis v. Emmelman*, 108 Ind. 530.

² *Donoho v. Vulcan Iron Works*, 7 Mo. Ap. 447, 451, *Lewis, P. J.*, 75 Mo. 401.

³ Ante, § 989.

⁴ *Adams v. Rivers*, 11 Barb. 390, 398.

⁵ Ante, § 459; *Riest v. Goshen*, 42 Ind. 339; *Sears v. Dennis*, 105 Mass.

310; *Williams v. Leyden*, 119 Mass. 237; *Chicago v. Bixby*, 84 Ill. 82; *Vicksburg v. Hennessy*, 54 Missis. 391; *Osborne v. Hamilton*, 29 Kan. 1; *Forks v. King*, 3 Norris, Pa. 230; *Butterfield v. Forrester*, 11 East, 60; *Hammond v. Mukwa*, 40 Wis. 35; *Stiles v. Geesey*, 21 Smith, Pa. 439; *Gribble v. Sioux City*, 38 Iowa, 390; *Fogg v. Nahant*, 106 Mass. 278; *Massey v. Columbus*,

commonly its decision is, under instructions from the court, for the jury.¹ But as the effect of proven facts is always for the court, and in cases which go past the bench to the jury they are to be instructed, this question of contributory negligence is practically very much of law.² Thus, —

§ 1013. **Degree of Care — Known Defects.** — It being the duty of the municipality to keep the highways in repair, persons passing over them have the right to assume that the duty is done,³ and that they are safe.⁴ In this condition of the facts, therefore, the traveller is required to use only ordinary care, and the non-exercise of extraordinary care will not defeat his recovery for injuries from a defect.⁵ But if, in a particular instance, he has knowledge that the way is in an ill condition, he must, should he use it, apply a greater or still greater care,⁶ according to the demands of the special facts.⁷ And the danger may be so imminent, and the necessity for passing over it so slight, that the court can pronounce the going upon it negligence in law, whereupon any resulting injury will be without recompense.⁸ Yet ordinarily, as the

75 Ga. 658; *Munger v. Marshalltown*, 56 Iowa, 216; *Hedges v. Kansas*, 18 Mo. Ap. 62; *Prince George's County v. Burgess*, 61 Md. 29.

¹ *Ante*, § 469; *Muller v. District of Columbia*, 5 Mackey, 286; *Brennan v. Friendship*, 67 Wis. 223; *Kenworthy v. Ironton*, 41 Wis. 647; *Pollard v. Woburn*, 104 Mass. 84; *Thomas v. New York*, 28 Hun, 110; *McCool v. Grand Rapids*, 58 Mich. 41; *Greenwood v. Callahan*, 111 Mass. 298; *Fulliam v. Muscatine*, 70 Iowa, 436; *Altoona v. Lotz*, 4 Am. Pa. 238; *Gulline v. Lowell*, 144 Mass. 491; *Evans v. Utica*, 69 N. Y. 166, 168; *Morrell v. Peck*, 88 N. Y. 398; *Osage City v. Brown*, 27 Kan. 74; *Hart v. Red Cedar*, 63 Wis. 634; *Daniels v. Lebanon*, 58 N. H. 284; *Ochsenbein v. Shapley*, 85 N. Y. 214; *Mattey v. Whittier Mach. Co.* 140 Mass. 337; *Sheehy v. Burger*, 62 N. Y. 558.

² *Ante*, § 442-444, 469; *Lindsey v. Danville*, 45 Vt. 72; *Houston v. Traphagen*, 18 Vroom, 23.

³ 1 Bishop Crim. Proced. § 1130, 1131.

⁴ *Indianapolis v. Gaston*, 58 Ind. 224; *Jennings v. Van Schaick*, 108 N. Y. 530.

⁵ *Griffin v. Willow*, 43 Wis. 509; *Lincoln v. Walker*, 18 Neb. 244, 250. And see *ante*, § 438, 468.

⁶ "He should be careful in proportion to the danger of which he has knowledge." *Black, C. in Henry County Turnp. v. Jackson*, 86 Ind. 111, 114.

⁷ *Owen v. Chicago*, 10 Bradw. 465; *Aurora v. Brown*, 12 Bradw. 122; *Walker v. Reidsville*, 96 N. C. 382; *Altoona v. Lotz*, 4 Am. Pa. 238; *Evans v. Utica*, 69 N. Y. 166; *Nicks v. Marshall*, 24 Wis. 139; *Indianapolis v. Cook*, 99 Ind. 10; *Wilson v. Trafalgar, &c. Gravel Road*, 93 Ind. 287; *Bullock v. New York*, 99 N. Y. 654; *Emporia v. Schmidling*, 33 Kan. 485; *post*, § 1064.

⁸ *Hartman v. Muscatine*, 70 Iowa, 511; *Merrill v. North Yarmouth*, 78 Maine, 200; *Wood v. Andes*, 11 Hun,

laying out of the way has established its legal necessity,¹ the mere fact that one, knowing of a defect, passes over it, will not defeat his claim should he suffer harm.² These not very exact rules require skill in the application to the ever-changing facts, yet they could not be made essentially more definite without becoming also misleading. As to —

§ 1014. **Children and their Parents.** — The doctrine of the contributory negligence of parents and children, where an injury befalls the child, is considered in a preceding chapter.³ There is little in the doctrine special to ways, requiring explanation here, but a reference to a few of the cases may be convenient.⁴ A five year old child's mere playing on a sidewalk does not necessarily bar the action for an injury.⁵

§ 1015. **How Use.** — Persons travelling upon a public way are entitled to go on whatever unoccupied part of it they choose;⁶ even on the vacant tracks laid for street cars.⁷ And pedestrians have an equal right with the carriages on the carriage-portion of the way; at least, while crossing.⁸ They

543; *Prince George's County v. Burgess*, 61 Md. 29; *Erie v. Magill*, 5 Out. Pa. 616; *Parkhill v. Brighton*, 61 Iowa, 103, 108; *Zettler v. Atlanta*, 66 Ga. 195; *Twogood v. New York*, 12 Daly, 220; *Burr v. Plymouth*, 48 Conn. 460; *McGinty v. Keokuk*, 66 Iowa, 725; *Maulthby v. Leavenworth*, 28 Kan. 745; *Corlett v. Leavenworth*, 27 Kan. 673; *Pittsburgh So. Ry. v. Taylor*, 8 Out. Pa. 306; *Momence v. Kendall*, 14 Bradw. 229.

¹ Ante, § 162.

² *Hawks v. Northampton*, 121 Mass. 10; *Fulliam v. Muscatine*, 70 Iowa, 436; *Thomas v. Western Union Tel. 100 Mass. 156*; *Albion v. Hetrick*, 90 Ind. 545; *McKenzie v. Northfield*, 30 Minn. 456; *Nichols v. Minneapolis*, 33 Minn. 430; *Gilbert v. Boston*, 139 Mass. 313; *Toledo, &c. Ry. v. Brannagan*, 75 Ind. 490; *Smith v. St. Joseph*, 45 Mo. 449; *Henry County Turnp. v. Jackson*, supra; *Montgomery v. Wright*, 72 Ala. 411; *Walker v. Decatur*, 67 Iowa, 307; *Osborne v. London, &c. Ry.* 21 Q. B. D. 220; *Osage City v. Brown*,

27 Kan. 74; *Ross v. Davenport*, 66 Iowa, 548; *Stephens v. Macon*, 83 Mo. 345; *Hart v. Red Cedar*, 63 Wis. 634; *Lowell v. Watertown*, 58 Mich. 568; *Dewire v. Bailey*, 131 Mass. 169; *Fox v. Sackett*, 10 Allen, 535.

³ Ante, § 572-590.

⁴ *Collins v. South Boston Rld.* 142 Mass. 301; *Smith v. Grand Street, &c. Rld.* 11 Abb. N. Cas. 62; *Chicago v. Hesing*, 83 Ill. 204; *Montfort v. Schmidt*, 36 La. An. 750; *Schierhold v. North Beach, &c. Rld.* 40 Cal. 447; *Galveston City Rld. v. Hewitt*, 67 Texas, 473; *Congreve v. Morgan*, 4 Duer, 439; *Farris v. Cass Avenue, &c. Ry.* 80 Mo. 325.

⁵ *Fallon v. Central Park, &c. Rld.* 64 N. Y. 13; *McGarry v. Loomis*, 63 N. Y. 104; *Birkett v. Knickerbocker Ice Co.* 41 Hun, 404.

⁶ *Smith v. Leavenworth*, 15 Kan. 81; *Foster v. Goddard*, 40 Maine, 64; *Stinson v. Gardiner*, 42 Maine, 248.

⁷ *Galveston City Rld. v. Hewitt*, 67 Texas, 473.

⁸ *Barker v. Savage*, 45 N. Y. 191;

may cross anywhere, not being limited to the cross-walks;¹ and, if they prefer, diagonally.² Vehicles on rails, and the common carriages however propelled, have, except as to the precedence of the former on their own tracks, equal privileges on the roads appropriated to all, and the duty of care in their drivers is mutual and equal.³ Now,—

§ 1016. **Meeting and Passing.**—A statutory provision nearly uniform in our States is, to quote the Massachusetts words, that, “when persons meet each other on a bridge or road, travelling with carriages, wagons, carts, sleds, sleighs, or other vehicles, each person shall seasonably drive his carriage or other vehicle to the right [not left, as in England and our American British Provinces] of the middle of the travelled part of such bridge or road, so that their respective carriages or other vehicles may pass each other without interference.”⁴ This statute does not apply to a person on foot⁵ or horseback,⁶ or to a railroad car,⁷ meeting the vehicle; or to a vehicle approaching it from a cross street,⁸ or to a building moved through the street.⁹ Nor does it apply to vehicles on the same street, except at the point of meeting; subject to which exception, they may occupy either side or the middle at the driver’s election.¹⁰ Nor yet does the provision thus quoted regulate the passing of one vehicle by another moving in the same direction; in which case, it should take the safer side.¹¹ But the Massachusetts statute adds, as to this, that such vehicle shall go “to the left of the middle of the trav-

Coombs v. Purrington, 42 Maine, 332; *Brooks v. Schwerin*, 54 N. Y. 343.

¹ *Moebus v. Herrmann*, 108 N. Y. 349.

² *Shea v. Reems*, 36 La. An. 966.

³ *Indianapolis, &c. Rld. v. McLin*, 82 Ind. 435; *Citizens Street Ry. v. Steen*, 42 Ark. 321. See *Cotterill v. Starkey*, 8 Car. & P. 691.

⁴ Mass. Pub. Stats. c. 93, § 1; *Commonwealth v. Allen*, 11 Met. 403.

⁵ *Cotterill v. Starkey*, 8 Car. & P. 691.

⁶ *Dudley v. Bolles*, 24 Wend. 465,

472. Contra, in England, *Turley v. Thomas*, 8 Car. & P. 103. See *Garrigan v. Berry*, 12 Allen, 84; *Beach v. Parmeter*, 11 Harris, Pa. 196.

⁷ *Hegan v. Eighth Avenue Rld.* 15 N. Y. 380.

⁸ *Lovejoy v. Dolan*, 10 Cush. 495; *Garrigan v. Berry*, supra.

⁹ *Graves v. Shattuck*, 35 N. H. 257.

¹⁰ *Parker v. Adams*, 12 Met. 415, 419; *Lovejoy v. Dolan*, supra, at p. 496; *Clifford v. Tyman*, 61 N. H. 508.

¹¹ *Clifford v. Tyman*, supra. And see *Avegno v. Hart*, 25 La. An. 235; *Bolton v. Colder*, 1 Watts, 360.

elled part of a bridge or road ; and, if the bridge or road is of sufficient width for the two vehicles to pass, the driver of the leading one shall not wilfully obstruct the same.”¹ Thereupon, —

§ 1017. **Further as to which.** — It is plain that, if the way is worked and used for travel its entire width, there is not literally any “travelled *part* ;” while yet two vehicles meeting, each directly in front of the other, are not therefore to collide, but the equity of the statute requires each to deflect to the right. If each is on the left side of the street, or far enough to the left of the other to avoid a collision, and in this manner they pass the point of meeting, the statute is not violated. And this leads us to the completed view ; namely, that its rule is for cases only, wherein, by the reasonable anticipation of parties meeting, the following of it may avoid a collision, not for those exceptional ones in which it would defeat its own purpose. Though this interpretation may not have been expressed in words by the judges, it harmonizes with and reconciles the decisions.² And it avoids an exception to the doctrine³ that the disregard of a command of the law is negligence. Where the statute is applicable, one about to meet another may justly assume that he will conform thereto, turning aside as it directs.⁴

§ 1018. **Negligence in Use.** — There is little occasion to add, what follows from explanations already appearing in this chapter and throughout the volume, that any negligence of one in even the lawful use of a street,⁵ resulting, as a natural

¹ Mass. Pub. Stats. c. 93, § 2 ; Smith v. Conway, 121 Mass. 216.

² Ante, § 466, 467 ; Beckerle v. Weiman, 12 Mo. Ap. 354 ; Reynolds v. Hanrahan, 100 Mass. 313 ; Flagg v. Hudson, 142 Mass. 280 ; Smith v. Gardner, 11 Gray, 418 ; Wrinn v. Jones, 111 Mass. 360 ; Kennard v. Burton, 25 Maine, 39 ; Jaquith v. Richardson, 8 Met. 213 ; Garrigan v. Berry, 12 Allen, 84 ; Grier v. Sampson, 3 Casey, Pa. 183 ; Butterfield v. Forrester, 11 East, 60 ; Lyons v. Child, 61 N. H. 72 ; Lynam v. Union Ry. 114 Mass. 83 ; Clay v.

Wood, 5 Esp. 44 ; Gale v. Lisbon, 52 N. H. 174.

³ Ante, § 140, 178, 445, 464, 652.

⁴ Wood v. Luscomb, 23 Wis. 287. And see Daniels v. Clegg, 28 Mich. 32.

⁵ Ante, § 436 ; Frazer v. Kimler, 5 Thomp. & C. 16, 2 Hun, 514 ; Macomber v. Nichols, 34 Mich. 212 ; Moulton v. Aldrich, 28 Kan. 300 ; Waters v. Wing, 9 Smith, Pa. 211 ; Murphy v. Orr, 96 N. Y. 14 ; Herrick v. Sullivan, 120 Mass. 576 ; Rumsey v. Nelson, 58 Vt. 590.

and probable consequence,¹ in injury to another who is himself without fault or negligence,² entitles the latter to compensation. So, —

§ 1019. **Municipal Liability.** — Under the like limitations, the town or city answerable for the condition of the ways³ is, if having due knowledge or notice it is negligent in the discharge of its duty of repair, liable in damages to one who suffers in person or estate from a defect therein.⁴ But, —

§ 1020. **Statutory Notice.** — In some of the States, by statute, a written notice of the nature and place of the injury must first be given to the town or city, without which the action cannot be maintained.⁵ But in the absence of a statute no notice before suit is necessary.⁶

§ 1021. **Illustrations of these Doctrines** — abound in the books. But, since the doctrines are plain, since the facts of cases so vary that what has been will never be exactly repeated, and since the slightest shifting of the facts will often change the result, the practitioner can derive but small help from particular instances. It may be said, in general terms, that, for the driver of a street car to be looking back instead of forward,⁷ in some circumstances for one taking a heavy load down a steep hill to omit to chain the wheel of his vehicle,⁸ or for one driving on a street-car track not to look

¹ Ante, § 457; *Aldrich v. Gorham*, 77 Maine, 287; *Galveston v. Posnainsky*, 62 Texas, 118; *Campbell v. Stillwater*, 32 Minn. 308; *Chicago v. Schmidt*, 107 Ill. 186; *Selleck v. Lake Shore, &c. Ry.* 58 Mich. 195.

² Ante, § 459, 1012–1014; *Belton v. Baxter*, 54 N. Y. 245; *Cressy v. Postville*, 59 Iowa, 62; *Albert v. Bleecker Street, &c. Rld.* 2 Daly, 389; *Tuffree v. State Center*, 57 Iowa, 538; *Shapleigh v. Wyman*, 134 Mass. 118; *Howard v. Tyler*, 46 Vt. 683; *Pittsburg, &c. Ry. v. Bumstead*, 48 Ill. 221; *Moulton v. Aldrich*, 28 Kan. 300.

³ Ante, § 957 et seq.

⁴ Ante, § 963–967; *Centralia v. Scott*, 59 Ill. 129; *Baldwin v. Greenwood Turnp.* 40 Conn. 238; *Montgomery v. Wright*, 72 Ala. 411; *Lyons*

v. Brookline, 119 Mass. 491; *Hannon v. Agnew*, 96 N. Y. 439; *Clark v. Lebanon*, 63 Maine, 393; *Southworth v. Old Colony, &c. Ry.* 105 Mass. 342; *Rushville v. Poe*, 85 Ind. 83; *Chappell v. Oregon*, 36 Wis. 145.

⁵ *Gregg v. Weathersfield*, 55 Vt. 385; *Shallow v. Salem*, 136 Mass. 136; *Fortin v. Easthampton*, 142 Mass. 486; *Canterbury v. Boston*, 141 Mass. 215; *Brown v. Southbury*, 53 Conn. 212; *Shea v. Lowell*, 132 Mass. 187; *Wormwood v. Waltham*, 144 Mass. 184; *Fields v. Hartford, &c. Rld.* 54 Conn. 9.

⁶ *Green v. Spencer*, 67 Iowa, 410.

⁷ *Collins v. South Boston Rld.* 142 Mass. 301.

⁸ *Aldrich v. Monroe*, 60 N. H. 118.

back to see whether a car is approaching,¹ is negligence. It is not necessarily and as of law such for one to have upon the street a horse with vision imperfect,² or for a blind person to be abroad without a guide,³ but this sort of matter, viewed in connection with the accompanying facts, will be for the jury. Great care should be exercised in passing with a carriage through a crowded street,⁴ but to drive at a "lively trot" is not of necessity negligence.⁵ Other illustrations might be added,⁶ but these will suffice, at least, to show how little practical help they are capable of rendering. It is as though a writer should attempt, by details of evidence and prior verdicts, to teach juries what findings to make in subsequent causes.

§ 1022. *The Doctrine of this Chapter restated.*

In the larger meaning of the words, every track or expanse, whether of land or water, over which all persons are privileged to pass, on foot or in any land or water vehicle, is a public way. The more familiar public ways are those constructed upon the land, for the use of people going from place to place, in their carriages, or on foot. How and by whom this sort of way is to be built and maintained, the rights and duties of particular persons and corporations relating to it, the remedies of travellers injured by defects therein, the manner of its use, and the consequences of misusing it,—these, severally and collectively, have furnished the principal topics of the chapter. And the rights and duties of persons regarding other ways have been shown to be analogous. The unfoldings have been so-wide and minute that further repetitions are not deemed to be here desirable.

¹ Wood v. Detroit City Street Ry. 92 N. Y. 652; Carter v. Chambers, 79 52 Mich. 402. Ala. 223.

² Wright v. Templeton, 132 Mass. 49. ⁶ For example, Sikes v. Sheldon, 53 Iowa, 744; Rockford v. Tripp, 83 Ill. 247; Parker v. Union Woollen Co. 42 Conn. 399; Faulkner v. Aurora, 85 Ind. 130; Conway v. Hannibal, &c. Rld. 24 Mo. Ap. 235.

³ Salem v. Goller, 76 Ind. 291; Smith v. Wildes, 143 Mass. 556.

⁴ Vaughn v. Scade, 30 Mo. 600.

⁵ Crocker v. Knickerbocker Ice Co.

BOOK VI.

LOCOMOTION OF PERSONS AND THINGS.

CHAPTER XLII.

THE EQUIPPING AND RUNNING OF RAILROADS.

§ 1023. **Degree of Care.** — Railroads and their equipments are, when in use, powerful instrumentalities, and in some circumstances dangerous. So they should be fitted up and operated with a corresponding care, which will vary with the particular danger, and the gravity of the consequences of a miscarriage.¹ Thus, —

§ 1024. **Construction and Equipment.** — The amplest skill and circumspection should be employed in the construction and equipment, and the materials and machinery should be subjected to the due tests.² All needful appliances for the safe running of cars — such as suitable brakes,³ coupling arrangements,⁴ headlights⁵ — should be provided. The locomotives should be in the proper condition;⁶ for instance, it

¹ Ante, § 438-441, 645, 646, 840, 843, 1013; *Hicks v. Pacific Rld.* 64 Mo. 430; *Unger v. Forty-second Street, &c.* Rld. 51 N. Y. 497; *Illinois Cent. Rld. v. Phillips*, 49 Ill. 234; *Chicago, &c. Rld. v. Stumps*, 55 Ill. 367; *East Tennessee, &c. Rld. v. Selcer*, 7 Lea, 557; *Louisville, &c. Rld. v. Connor*, 9 Heisk. 19; *Hill v. Louisville, &c. Rld.* 9 Heisk. 823; *Memphis, &c. Rld. v. Smith*, 9 Heisk. 860.

² Ante, § 644-646; *Illinois Cent. N. Y.* 312.

Rld. v. Phillips, 49 Ill. 234, 237, 55 Ill. 194; *Solomon Rld. v. Jones*, 30 Kan. 601.

³ *Forbes v. Atlantic, &c. Rld.* 76 N. C. 454; *Union Pacific Ry. v. Harwood*, 31 Kan. 388.

⁴ *Gottlieb v. New York, &c. Rld.* 100 N. Y. 462; *Whitwam v. Wisconsin, &c. Rld.* 58 Wis. 408.

⁵ *Alabama Great So. Rld. v. Jones*, 71 Ala. 487.

⁶ *Bajus v. Syracuse, &c. Rld.* 103 N. Y. 312.

is negligence to use one from which water leaks, forming ice, and thus endangering a switchman.¹ An insecure bridge,² a hole in a platform,³ litter or other things in the right of way or in the company's approaches to it, from which harm may arise,⁴ must be avoided. At times indicated by the circumstances, the track must be inspected, and injuries from storms and other things promptly guarded and repaired.⁵ The appliances must be kept in repair,⁶ and suitable servants in due numbers provided.⁷

§ 1025. *Speed.* — In the absence of any statute, municipal by-law, or rule of the particular road,⁸ regulating the speed of cars, no excessive rapidity will constitute negligence *per se*,⁹ though, in passing upon an accident alleged to have proceeded from the road's negligence, the jury may consider the speed in connection with the other facts.¹⁰ But we have various statutes¹¹ and city by-laws¹² restricting the speed in par-

¹ *Flynn v. Wabash, &c. Rld.* 18 Bradw. 235.

² *Louisville, &c. Ry. v. Thompson*, 107 Ind. 442.

³ *Louisville, &c. Rld. v. Wolfe*, 80 Ky. 82.

⁴ *Hayden v. Skillings*, 78 Maine, 413; *Gleeson v. Virginia Midland Rld.* 5 Mackey, 356; *Texas, &c. Ry. v. Val-lie*, 60 Texas, 481; *Moore v. Wabash, &c. Ry.* 84 Mo. 481; *Hulehan v. Green Bay, &c. Ry.* 58 Wis. 319; *Kearns v. Chicago, &c. Ry.* 66 Iowa, 599; *Montgomery, &c. Ry. v. Chambers*, 79 Ala. 338.

⁵ *Hardy v. North Carolina Cent. Rld.* 74 N. C. 734; *Sweeney v. Minneapolis, &c. Ry.* 33 Minn. 153.

⁶ *Ante*, § 647; *Belair v. Chicago, &c. Ry.* 43 Iowa, 662.

⁷ *Ante*, § 653-656; *Toledo, &c. Ry. v. McGinnis*, 71 Ill. 346; *Hoye v. Chicago, &c. Ry.* 67 Wis. 1; *Hays v. Houston, &c. Rld.* 46 Texas, 272; *New Orleans, &c. Rld. v. Burke*, 53 Missis. 200; *Schmidt v. Chicago, &c. Ry.* 83 Ill. 405; *Sellers v. Richmond, &c. Rld.* 94 N. C. 654; *East Tennessee, &c. Rld. v. White*, 5 Lea, 540; *Burns v. North*

Chicago Rolling Mill, 65 Wis. 312; *McGrath v. New York Cent. &c. Rld.* 1 Thomp. & C. 243.

⁸ *Ante*, § 652; *International, &c. Ry. v. Gray*, 65 Texas, 32.

⁹ *McKonkey v. Corning, &c. Rld.* 40 Iowa, 205; *East Tennessee, &c. Rld. v. Winters*, 85 Tenn. 240; *Main v. Hannibal, &c. Rld.* 18 Mo. Ap. 388; *Powell v. Missouri Pac. Ry.* 76 Mo. 80; *Chicago, &c. Ry. v. Givens*, 18 Bradw. 404.

¹⁰ *Artz v. Chicago, &c. Rld.* 44 Iowa, 284; *East Tennessee, &c. Rld. v. Deaver*, 79 Ala. 216.

¹¹ *Central Rld. v. Russell*, 75 Ga. 810; *Illinois Cent. Rld. v. Jordan*, 63 Missis. 458; *New Orleans, &c. Rld. v. Toulme*, 59 Missis. 284.

¹² *Neier v. Missouri Pac. Ry.* 12 Mo. Ap. 25; *Bowman v. Chicago, &c. Rld.* 85 Mo. 533; *Hanlon v. South Boston Horse Rld.* 129 Mass. 310; *Crowley v. Burlington, &c. Ry.* 65 Iowa, 658; *Mahan v. Union Depot, &c. Co.* 34 Minn. 29; *Fell v. Burlington, &c. Rld.* 43 Iowa, 177; *Philadelphia, &c. Rld. v. Stebbing*, 62 Md. 504.

ticular places ; disobedience to which is, among other consequences, negligence.¹ A like doctrine applies to —

§ 1026. **Signals.** — Where, as is common, a statute or ordinance requires a bell to be rung, a whistle to be blown, or other signal or precaution, at a particular place or time, a neglect of it, like any other negligence, will be actionable if damage is thereby caused to a person not himself in fault.² And it is negligence so to run trains as to render the statutory signals unavailing as warnings.³ Moreover, since all may justly rely upon the road's following its own rules, the omission of a signal required by a rule will have an equal effect, as negligence, with that of a statutory one.⁴ But in the absence of any rule of the road or law on the subject, the duty is simply to run the cars with due care ; and, though this may in some instances require signals, there is no code of signals, or general necessity for them, to be observed.⁵ The whistle, for example, need not then be blown at a crossing.⁶

§ 1027. **Fires.** — Whatever be the danger of ignition from locomotives, the charter of a railroad justifies the use of them, and frees the road from liability to individuals necessarily, or of pure accident,⁷ subjected to loss or injury therefrom.⁸ But

¹ Ante, § 1017, and places there cited ; *Messenger v. Pate*, 42 Iowa, 443.

² *Louisville, &c. Rld. v. Burke*, 6 Coldw. 45 ; *Terre Haute, &c. Rld. v. Black*, 18 Bradw. 45 ; *Houston, &c. Cent. Ry. v. Wilson*, 60 Texas, 142 ; *Ransom v. Chicago, &c. Ry.* 62 Wis. 178 ; *Dodge v. Burlington, &c. Rld.* 34 Iowa, 276 ; *Missouri Pac. Ry. v. Pierce*, 33 Kan. 61 ; *Paducah, &c. Rld. v. Hoehl*, 12 Bush, 41 ; *Rafferty v. Missouri Pac. Ry.* 91 Mo. 33 ; *Terry v. St. Louis, &c. Ry.* 89 Mo. 586 ; *Chicago, &c. Rld. v. Lee*, 60 Ill. 501 ; *Cincinnati, &c. Rld. v. Butler*, 103 Ind. 31 ; *Chicago, &c. Rld. v. Boggs*, 101 Ind. 522 ; *Howenstein v. Pacific Rld.* 55 Mo. 33 ; *Hoover v. Texas, &c. Ry.* 61 Texas, 503 ; *Chicago, &c. Rld. v. Henderson*, 66 Ill. 494 ; *Baltimore, &c. Rld. v. The State*, 62 Md. 479 ; *East Tennessee, &c. Rld. v. Pratt*, 85 Tenn. 9.

³ *Chicago, &c. Rld. v. Boggs*, 101 Ind. 522 ; *Gonzales v. New York, &c. Rld.* 39 How. Pr. 407. See *Baltimore, &c. Rld. v. Mali*, 66 Md. 53.

⁴ Ante, § 652 ; *Texas, &c. Ry. v. Mallon*, 65 Texas, 115. And see *Romick v. Chicago, &c. Ry.* 62 Iowa, 167 ; *Phillips v. Chicago, &c. Ry.* 64 Wis. 475 ; *Chicago, &c. Rld. v. McDonald*, 21 Ill. Ap. 409.

⁵ *Pennsylvania Rld. v. Barnett*, 9 Smith, Pa. 259 ; *Beisiegel v. New York Cent. Rld.* 40 N. Y. 9 ; *Grippen v. New York Cent. Rld.* 40 N. Y. 34 ; *Moran v. Nashville, &c. Rld.* 2 Baxter, 379 ; *Loucks v. Chicago, &c. Ry.* 31 Minn. 526.

⁶ *Brown v. Milwaukee, &c. Ry.* 22 Minn. 165 ; *Cordell v. New York, &c. Rld.* 64 N. Y. 535 ; *Spencer v. Illinois Cent. Rld.* 29 Iowa, 55.

⁷ Ante, § 176, 177.

⁸ Ante, § 111, 184 ; *Chicago, &c.*

any negligence in the exercise of this right,¹ resulting in a fire to the damage of a person not in fault, will entitle him to indemnity.² And negligence will be presumed, *prima facie*, from the mere setting of the fire by the locomotive; casting on the road the burden of showing due care.³ Of course, the care must be commensurate with the gravity of the case.⁴ Thus, —

§ 1028. **Spark-arresters.** — The engines must have spark-arresters, presumably safe, or the best; though not necessarily the newest, or untried inventions.⁵ Yet they alone do not fill the measure of the required care; it must be complete in every respect;⁶ as, —

§ 1029. **Combustibles.** — The road is under a duty to the abutters, the precise extent of which depends on decisions not quite uniform, to keep its right of way free from dry grass and weeds, and other rubbish liable to be set on fire by its engines, to the endangering of adjoining property. The neglect of this duty is not commonly deemed negligence *per se*; but from it the jury may infer the negligence which will charge the road, whatever may be its spark-arresters, if the property of one not himself negligent is burned.⁷ As to —

Rld. v. Smith, 11 Bradw. 348; Chicago, &c. Rld. v. Loeb, 118 Ill. 203; Dimmock v. North Staffordshire Ry. 4 Fost. & F. 1058.

¹ Ante, § 115, 179.

² Wise v. Joplin Rld. 85 Mo. 178; Crews v. Kansas City, &c. Rld. 19 Mo. Ap. 302; Louisville, &c. Ry. v. Spenn, 87 Ind. 322; Louisville, &c. Ry. v. Ehlert, 87 Ind. 339; McCaig v. Erie Ry. 8 Hun, 599; Missouri Pac. Ry. v. Texas, &c. Ry. 31 Fed. Rep. 526; Pigot v. Eastern Counties Ry. 3 C. B. 229, 10 Jur. 571; Louisville, &c. Ry. v. Krimming, 87 Ind. 351; Louisville, &c. Ry. v. Hanmann, 87 Ind. 422; Lowney v. New Brunswick Ry. 78 Maine, 479; Gibson v. Southeastern Ry. 1 Fost. & F. 23; Lanning v. Chicago, &c. Ry. 68 Iowa, 502.

³ Ante, § 443; Simpson v. East Tennessee, &c. Rld. 5 Lea, 456; International, &c. Ry. v. Timmermann, 61

Texas, 660; Green Ridge Rld. v. Brinkman, 64 Md. 52; Huff v. Missouri Pac. Ry. 17 Mo. Ap. 356; Diamond v. Northern Pac. Rld. 6 Mont. 580; Jones v. Michigan Cent. Rld. 59 Mich. 437. See Ruppel v. Manhattan Ry. 13 Daly, 11; Ashley v. Manhattan Ry. 13 Daly, 205; Brusberg v. Milwaukee, &c. Ry. 55 Wis. 106; Albert v. Northern Cent. Ry. 2 Out. Pa. 316.

⁴ Ante, § 1023; post, § 1064.

⁵ Ante, § 646; Toledo, &c. Ry. v. Corn, 71 Ill. 493; Kalbfleisch v. Long Island Rld. 102 N. Y. 520; Bright-hope Ry. v. Rogers, 76 Va. 443; Indiana, &c. Ry. v. Craig, 14 Bradw. 407.

⁶ Wilson v. Atlanta, &c. Ry. 16 S. C. 587; Philadelphia, &c. Rld. v. Schultz, 12 Norris, Pa. 341; Patton v. St. Louis, &c. Ry. 87 Mo. 117; Carter v. Kansas City, &c. Ry. 65 Iowa, 287; Palmer v. Missouri Pac. Ry. 76 Mo. 217.

⁷ Illinois Cent. Rld. v. Frazier, 64

§ 1030. **Contributory Negligence.**—It is not incumbent on an abutter to anticipate and guard against the road's negligence.¹ Therefore the accumulation of combustibles on one's land, rendering the communication of a fire from the railroad more probable, is not commonly and absolutely contributory negligence;² though special circumstances, involving gross carelessness, may justify a jury in finding it such.³ *A fortiori*, the non-removal of combustibles from the right of way, by the owner of the fee, is not a neglect of this or any other sort.⁴

§ 1031. **Statutes**—have, in some of the States, made special provisions regarding railroad fires, more or less modifying the common-law rules.⁵

§ 1032. **Other Questions**,—liable to arise, depend on the principles developed in this chapter. Some of the questions to be considered in the next two chapters might be brought within the present one. Still others have presented themselves incidentally in various connections throughout the volume. The divisions of the subject are for practical convenience.

Ill. 28; Burlington, &c. Rld. v. Westover, 4 Neb. 268; Henry v. Southern Pac. Rld. 50 Cal. 176; Pittsburgh, &c. Rld. v. Nelson, 51 Ind. 150; Pittsburgh, &c. Ry. v. Hixon, 79 Ind. 111; Slossen v. Burlington, &c. Ry. 60 Iowa, 215; Carter v. Kansas City, &c. Ry. 65 Iowa, 287; Pennsylvania Rld. v. Hope, 30 Smith, Pa. 373; Balsley v. St. Louis, &c. Rld. 119 Ill. 68; Richmond, &c. Rld. v. Medley, 75 Va. 499; Texas, &c. Ry. v. Medaris, 64 Texas, 92; Ohio, &c. Rld. v. Shanefelt, 47 Ill. 497; Clarke v. Chicago, &c. Ry. 33 Minn. 359; Aycock v. Raleigh, &c. Rld. 89 N. C. 321; Hayden v. Skillings, 78 Maine, 413; Indianapolis, &c. Rld. v. Smith, 78 Ill. 112; Ohio, &c. Ry. v. Clutter, 82 Ill. 123; Brighthope Ry. v. Rogers, 76 Va. 443; Troxler v. Richmond, &c. Rld. 74 N. C. 377.

¹ Lindsay v. Winona, &c. Rld. 29 Minn. 411, 412; Philadelphia, &c. Rld. v. Hendrickson, 30 Smith, Pa. 182; Kalbfleisch v. Long Island Rld. 102 N. Y. 520.

² Philadelphia, &c. Rld. v. Schultz, 12 Norris, Pa. 341; Louisville, &c. Ry. v. Krimming, 87 Ind. 351; Patton v. St. Louis, &c. Ry. 87 Mo. 117; Palmer v. Missouri Pac. Ry. 76 Mo. 217; Richmond, &c. Rld. v. Medley, 75 Va. 499; Pittsburgh, &c. Ry. v. Hixon, 79 Ind. 111.

³ Kansas Pac. Ry. v. Brady, 17 Kan. 380; Toledo, &c. Ry. v. Maxfield, 72 Ill. 95; Ormond v. Central Iowa Ry. 58 Iowa, 742; Lewis v. Chicago, &c. Ry. 57 Iowa, 127.

⁴ Pittsburgh, &c. Ry. v. Jones, 86 Ind. 496.

⁵ Indiana, &c. Ry. v. Nicewander, 21 Ill. Ap. 305; Davis v. Providence, &c. Rld. 121 Mass. 134; Thompson v. Richmond, &c. Rld. 24 S. C. 366; Rowell v. Railroad, 57 N. H. 132; Babcock v. Chicago, &c. Ry. 62 Iowa, 593; Grissell v. Housatonic Rld. 54 Conn. 447; Simmonds v. New York, &c. Rld. 52 Conn. 264; Stratton v. European, &c. Ry. 74 Maine, 422; Wiley v. West Jersey Rld. 15 Vroom, 247.

§ 1033. *The Doctrine of this Chapter restated.*

Railroads should be constructed, equipped, manned, and run with a care proportioned to the gravity of the consequences of a miscarriage therein. And when this duty is fully done, both by the corporation owning the road and by its servants, it is under no responsibility to individuals casually injured. If damage comes to one through any omission of corporate duty, or of the servants of the road in their duties, he is entitled to compensation. When there is negligence both in the road and in the injured party, the general rule applies, that neither party to a mutual negligence can recover anything of the other.

CHAPTER XLIII.

GOING UPON AND CROSSING RAILROADS.

- § 1034. Introduction.
- 1035-1038. Trespassing on Track.
- 1039-1049. Rightfully Crossing.
- 1050-1053. Further Expositions.
- 1054. Doctrine of Chapter restated.

§ 1034. **How Chapter divided.** — We shall consider this subject as to, I. Trespassing on the Track ; II. Rightfully Crossing it ; III. Further Expositions.

I. *Trespassing on the Track.*

§ 1035. **Complications and Distinctions.** — Trespasses upon railroad tracks are of various grades, — purely intentional, accidental, at remote places where not to be anticipated, at thronged places where they occur as of course, under allurements which the road itself has held out, with its silence amounting to a *quasi* consent, over its fences and against its warnings, — and each particular grade may change or bend the governing rule of the law. The differing legal rules have already been brought to view in this volume ; we shall look at some of them again as we proceed.

§ 1036. **Doctrine defined.** — A railroad company, like an individual owner of land,¹ owes no duty of carefulness to persons coming upon its track purely as trespassers, and it is not answerable for injuries casually resulting to them.² But

¹ Ante, § 845.

&c. Rld. v. Hummell, 8 Wright, Pa.

² Ante, § 60 ; Chicago, &c. Rld. v. 375 ; Harty v. Central Rld. 42 N. Y. Hedges, 105 Ind. 398 ; Philadelphia, 468 ; Grethen v. Chicago, &c. Ry. 22

under the rule that discovered negligence does not bar a complaining party as being contributory,¹ and within a wide protection which the law accords to known trespassers,² if those running a train discover a trespasser in danger, they must use all reasonable exertions to avert from him the impending harm, or the road will be responsible for whatever injury follows.³ Thus,—

§ 1037. **Walking on Track.**—If the servants running the cars, and keeping the lookout which they ought for the safety of the train,⁴ discover an apparently capable person walking on the track before them, they, having given whatever signals may be required by the rules of the road, by a municipal by-law, or by a statute, may presume that he will seasonably step aside, so they need not diminish their speed; and, if they omit no duty after becoming aware of his peril, the road will not be responsible for a resulting injury.⁵ But if they know

Fed. Rep. 609; *Harlan v. St. Louis, &c. Rld.* 64 Mo. 480; *Illinois Cent. Rld. v. Frelka*, 9 Bradw. 605; *Bell v. Hannibal, &c. Rld.* 86 Mo. 599.

¹ Ante, § 466, compared with § 475.

² Ante, § 200, 824, 846, 847.

³ *Hicks v. Pacific Rld.* 64 Mo. 430; *Harlan v. St. Louis, &c. Rld.* supra; *Cook v. Central Rld. &c. Co.* 67 Ala. 533; *Burnett v. Burlington, &c. Rld.* 16 Neb. 332; *Kelley v. Union Ry. &c. Co.* 18 Mo. Ap. 151; *Rine v. Chicago, &c. Rld.* 88 Mo. 392; *Missouri Pac. Ry. v. Weisen*, 65 Texas, 443.

⁴ Possibly there may be a difference of opinion as to whether the neglect to discover a trespasser will charge the road. In *Masser v. Chicago, &c. Ry.* 68 Iowa, 602, 606, *Adams, C. J.* puts the doctrine thus: "The plaintiff contends that the boy might and should have been discovered sooner. It seems not improbable that he might have been discovered a little sooner, but no locomotive engineer is bound to watch out for trespassers upon the track. The company does not owe trespassers that kind of care. This has been settled by repeated adjudications." Referring to

Gaynor v. Old Colony, &c. Ry. 100 Mass. 208, 214; *Illinois Cent. Rld. v. Godfrey*, 71 Ill. 500; *McClaren v. Indianapolis, &c. Rld.* 83 Ind. 319; *Baltimore, &c. Rld. v. The State*, 62 Md. 479; *Chicago, &c. Rld. v. Houston*, 95 U. S. 697, 702. Such appears to be also the doctrine of reason; yet, if the engineer knows that a particular place is frequented by trespassers, he has a sort of notice, upon which he may well be required to act according to the special circumstances. *Butler v. Milwaukee, &c. Ry.* 28 Wis. 487; *Davis v. Chicago, &c. Ry.* 58 Wis. 646; *Kay v. Pennsylvania Rld.* 15 Smith, Pa. 269; *Cassida v. Oregon Ry. &c. Co.* 14 Oregon, 551; *Western, &c. Rld. v. Meigs*, 74 Ga. 857.

⁵ *Terre Haute, &c. Rld. v. Graham*, 46 Ind. 239; *Frech v. Philadelphia, &c. Rld.* 39 Md. 574; *Frazer v. South and North Alabama Rld.* 81 Ala. 185; *Maloy v. Wabash, &c. Ry.* 84 Mo. 270; *Savannah, &c. Ry. v. Stewart*, 71 Ga. 427; *Central Trust Co. v. Wabash, &c. Ry.* 26 Fed. Rep. 896; *Finlayson v. Chicago, &c. Rld.* 1 Dil. 579.

him to be deaf,¹ or drunk,² or otherwise specially in danger,³ or if the person is a child too young to appreciate the danger,⁴ or if they neglect a reasonable warning,⁵ should they then keep on and inflict damage, the road will be answerable. It will be the same also if they wilfully, or by a negligence so extreme as to amount to wilfulness, injure the trespasser.⁶ But for injuries from mere ordinary negligence, the defence that they came to the complaining party in the course and in consequence of a trespass on the track will suffice.⁷

§ 1038. **Omitting Signal.** — Though the failure to give a signal required by the law or a rule of the road is negligence in its management,⁸ not always, perhaps never in just doctrine, can a trespasser so avail himself of the omission as to charge the road.⁹ But some permit this, at least in special circumstances.¹⁰ And all allow the non-negligent person who is not a trespasser, or even perhaps a mere technical trespasser, to found a liability upon the omission.¹¹ The authorities cited to these propositions are not absolutely distinct and conclusive,

¹ *International, &c. Ry. v. Smith*, 62 Texas, 252.

² *St. Louis, &c. Ry. v. Wilkerson*, 46 Ark. 513.

³ *Frech v. Philadelphia, &c. Rld.* supra; *Cook v. Central Rld. &c. Co.* 67 Ala. 533; *Mobile, &c. Rld. v. Stroud*, 64 Missis. 784.

⁴ Ante, § 586; *Texas, &c. Ry. v. O'Donnell*, 58 Texas, 27; *Donahoe v. Wabash, &c. Ry.* 83 Mo. 560.

⁵ *Donahoe v. Wabash, &c. Ry.* 83 Mo. 543.

⁶ *Terre Haute, &c. Rld. v. Graham*, 46 Ind. 239; *Illinois Cent. Rld. v. Godfrey*, 71 Ill. 500.

⁷ *Grethen v. Chicago, &c. Ry.* 22 Fed. Rep. 609; *Mynning v. Detroit, &c. Rld.* 59 Mich. 257; *Moore v. Philadelphia, &c. Rld.* 12 Out. Pa. 349; *Chicago, &c. Rld. v. Olson*, 12 Bradw. 245; *Bresnahan v. Michigan Cent. Rld.* 49 Mich. 410; *Hogan v. Chicago, &c. Ry.* 59 Wis. 139; *McClaren v. Indianapolis, &c. Rld.* 83 Ind. 319; *Tennenbrock v. South Pac. Coast Rld.* 59 Cal. 269;

Terre Haute, &c. Rld. v. Graham, 95 Ind. 286; *Baltimore, &c. Rld. v. The State*, 54 Md. 648; *Nicholson v. Erie Ry.* 41 N. Y. 525; *Maloy v. Wabash, &c. Ry.* 84 Mo. 270; *Louisville, &c. Rld. v. Howard*, 82 Ky. 212; *Western, &c. Rld. v. Bloomingdale*, 74 Ga. 604; *Illinois Cent. Rld. v. Hall*, 72 Ill. 222; *Mobile, &c. Rld. v. Stroud*, 64 Missis. 784; *Central Rld. v. Brinson*, 70 Ga. 207.

⁸ Ante, § 1026.

⁹ Ante, § 132; *Louisville, &c. Rld. v. Howard*, 82 Ky. 212, 219; *Ivens v. Cincinnati, &c. Ry.* 103 Ind. 27; *Harty v. Central Rld.* 42 N. Y. 468; *Baltimore, &c. Rld. v. Depew*, 40 Ohio State, 121.

¹⁰ *East Tennessee, &c. Rld. v. Humphreys*, 12 Lea, 200; *Georgia Rld. v. Williams*, 74 Ga. 723.

¹¹ *Vicksburg, &c. Rld. v. McGowan*, 62 Missis. 682; *Cumming v. Brooklyn City Rld.* 38 Hun, 362; *McWilliams v. Detroit Cent. Mills*, 31 Mich. 274.

and the like may be said of analogous cases to be here added in a note.¹ In reason, rules requiring signals, prohibiting dangerously fast running, and the like, should be construed as intended to protect persons to whom the road owes a duty, not trespassers; so that the former only can found rights upon them.²

II. *Rightfully Crossing the Track.*

§ 1039. **Much Litigated.** — The liability to injuries from crossing railroad tracks are very great, resulting in much litigation, and the reported cases are in number immense. The doctrine is plain; namely, —

§ 1040. **Doctrine defined.** — Railroad companies, running their cars, and persons lawfully crossing their tracks, — as, at street crossings, — are under the mutual and equal duty to exercise a care proportioned to the perils of the situation;³ and, for any damage coming to the individual solely from the road's want of care, he may have from it compensation. But, —

§ 1041. **Contributory Negligence** — If there is negligence on both sides, the one whose negligence contributed to the result whereof he complains, can have no redress, even though the road's negligence was greater, — the case being within the explanations of a preceding chapter.⁴ Of course, —

§ 1042. **Apparent Exceptions — Wilful.** — The contributory negligence of the person injured is not a bar to his recovery

¹ East Tennessee, &c. Rld. v. Swaney, 5 Lea, 119; Bergman v. St. Louis, &c. Ry. 88 Mo. 678; Crowley v. Burlington, &c. Ry. 65 Iowa, 658.

² And see Chicago, &c. Ry. v. Eisinger, 114 Ill. 79.

³ Leavenworth, &c. Rld. v. Rice, 10 Kan. 426; Chicago, &c. Ry. v. Sweeney, 52 Ill. 325; Pennsylvania Co. v. Krick, 47 Ind. 368; Indiana, &c. Ry. v. Greene, 106 Ind. 279; Bower v. Chicago, &c. Ry. 61 Wis. 457; Toledo, &c. Ry. v. Miller, 76 Ill. 278; Thomas v. Delaware, &c. Rld. 19 Blatch. 533.

⁴ Ante, § 458-473; Williams v. Chi-

cago, &c. Ry. 64 Wis. 1; Payne v. Chicago, &c. Ry. 39 Iowa, 523; Ormsbee v. Boston, &c. Rld. 14 R. I. 102; The State v. Maine Cent. Rld. 76 Maine, 357; Flemming v. Western Pac. Rld. 49 Cal. 253; Indiana, &c. Ry. v. Greene, 106 Ind. 279; Pzolla v. Michigan Cent. Rld. 54 Mich. 273; Thompson v. Flint, &c. Ry. 57 Mich. 300; Harris v. Minneapolis, &c. Ry. 33 Minn. 459; International, &c. Ry. v. Graves, 59 Texas, 330; Wheelwright v. Boston, &c. Rld. 135 Mass. 225; Cleveland, &c. Ry. v. Elliott, 28 Ohio State, 340; Toledo, &c. Ry. v. Head, 62 Ill. 233.

of damages in cases within the apparent exceptions to the general doctrine of contributory negligence,¹ or where the injury was inflicted by the road wilfully, or with such extreme disregard of duty as to amount to design.²

§ 1043. **Preparing to Cross — (Looking and Listening).** — To avoid the bar of contributory negligence, one approaching the track, about to cross it, must exert his faculties to discover whether or not there is danger.³ The common precaution is to look both ways and listen; perhaps, where the view of the track is unobstructed and sufficiently wide, it satisfies the rule simply to look, otherwise and commonly one should also listen.⁴ It is not ordinarily essential to stop, or especially to get out of one's carriage and walk to the track;⁵ but, where the view is obstructed, and the caution must consist mainly in listening, it may be a duty to produce quiet by stopping,⁶ or the duty may be to walk to a place whence the track can be seen.⁷ Some appear to hold the obligation to stop, still

¹ Ante, § 463-466, 471-473.

² Ante, § 475, 1037; *Tucker v. Duncan*, 4 Woods, 652; *Louisville, &c. Ry. v. Bryan*, 107 Ind. 51; *Belt Rld. &c. Co. v. Mann*, 107 Ind. 89; *Gothard v. Alabama Great So. Rld.* 67 Ala. 114; *Galena, &c. Rld. v. Jacobs*, 20 Ill. 478.

³ *Chicago, &c. Ry. v. Gertsen*, 15 Bradw. 614; *Morris, &c. Rld. v. Haslan*, 4 Vroom, 147; *Langhoff v. Milwaukee, &c. Ry.* 23 Wis. 43; *Chicago, &c. Rld. v. Robinson*, 9 Bradw. 89; *Cleveland, &c. Ry. v. Elliott*, 28 Ohio State, 340; *Wabash, &c. Ry. v. Central Trust Co.* 23 Fed. Rep. 738; *Griffin v. Chicago, &c. Ry.* 68 Iowa, 638.

⁴ *Gorton v. Erie Ry.* 45 N. Y. 660; *Havens v. Erie Ry.* 41 N. Y. 296; *Baxter v. Troy, &c. Rld.* 41 N. Y. 502; *Rhoades v. Chicago, &c. Ry.* 58 Mich. 263; *Powell v. Missouri Pac. Ry.* 76 Mo. 80; *Bellefontaine Ry. v. Hunter*, 33 Ind. 335; *McGuire v. Hudson River Rld.* 2 Daly, 76; *Schofield v. Chicago, &c. Rld.* 2 McCrary, 268, 114 U. S. 615; *Bronk v. New York, &c. Rld.* 5 Daly, 454; *Chicago, &c. Rld. v. Hedges*, 105 Ind. 398; *Pence v. Chicago, &c. Ry.* 63

Iowa, 746; *Taylor v. Missouri Pac. Ry.* 86 Mo. 457; *Hixson v. St. Louis, &c. Rld.* 80 Mo. 335; *Mahlen v. Lake Shore, &c. Ry.* 49 Mich. 585; *Union Pac. Ry. v. Adams*, 33 Kan. 427; *Chicago, &c. Rld. v. Bell*, 70 Ill. 102; *Illinois Cent. Rld. v. Goddard*, 72 Ill. 567; *Chicago, &c. Ry. v. Hatch*, 79 Ill. 137; *Chicago, &c. Rld. v. Harwood*, 80 Ill. 88; *Rockford, &c. Rld. v. Byam*, 80 Ill. 528; *Benton v. Central Rld.* 42 Iowa, 192; *Brown v. Milwaukee, &c. Ry.* 22 Minn. 165; *New Orleans, &c. Rld. v. Mitchell*, 52 Missis. 808; *Cleveland, &c. Ry. v. Elliott*, 28 Ohio State, 340; *Fletcher v. Atlantic, &c. Rld.* 64 Mo. 484.

⁵ *Duffy v. Chicago, &c. Ry.* 32 Wis. 269; *Davis v. New York, &c. Rld.* 47 N. Y. 400.

⁶ *Pennsylvania Co. v. Frana*, 112 Ill. 398; *Chase v. Maine Cent. Rld.* 78 Maine, 346; *Shaber v. St. Paul, &c. Ry.* 28 Minn. 103; *Kelly v. Chicago, &c. Rld.* 88 Mo. 534.

⁷ *Pennsylvania Rld. v. Beale*, 23 Smith, Pa. 504.

more strongly. And they treat it, and that to look and listen, as absolute; rendering an omission of it negligence *per se*, and of law, barring the right.¹ But it is believed that most courts more accurately regard this sort of matter as mere evidence, like any other in the case; submitting all, with proper instructions, to the jury, yet with the exceptions recognized in the general law of negligence.² To omit looking and listening where neither can do any good — as, where the track is hidden from sight, and other sounds drown the noise of the cars — is not contributory negligence.³ And there are other circumstances in which the rule of looking and listening cannot, in the nature of this sort of thing, be inflexible.⁴ Therefore to go upon the track in disregard of it “is not necessarily and as a question of law” negligence.⁵

§ 1044. **Flagmen and Gates.** — If the railroad employs a flagman, gate, or other device to warn people of approaching danger, a traveller is not negligent who, instead of looking and listening, follows the signals.⁶ Yet the mere absence of the flagman from a place where commonly stationed, while it

¹ Reading, &c. Rld. v. Ritchie, 6 Out. Pa. 425; Pennsylvania Rld. v. Beale, *supra*; Pennsylvania Rld. v. Ackerman, 24 Smith, Pa. 265; North Pa. Rld. v. Heileman, 13 Wright, Pa. 60; Lesan v. Maine Cent. Rld. 77 Maine, 85; The State v. Maine Cent. Rld. 77 Maine, 538; Maryland Cent. Rld. v. Neubeur, 62 Md. 391; Pennsylvania Canal v. Bentley, 16 Smith, Pa. 30; Cleveland, &c. Rld. v. Rowan, 16 Smith, Pa. 393; Clark v. Missouri Pac. Ry. 35 Kan. 350.

² Ante, § 442-444, 469; Randall v. Connecticut River Rld. 132 Mass. 269; Abbett v. Chicago, &c. Ry. 30 Minn. 482; Pennsylvania Co. v. Frana, 112 Ill. 398; Greany v. Long Island Rld. 101 N. Y. 419; Young v. Detroit, &c. Ry. 56 Mich. 430; Lehigh Valley Rld. v. Brandtmaier, 3 Am. Pa. 610; Baltimore, &c. Rld. v. Owings, 65 Md. 502; Ferguson v. Wisconsin Cent. Rld. 63 Wis. 145; Mayo v. Boston, &c. Rld. 104 Mass. 137; Artz v. Chicago, &c.

Rld. 34 Iowa, 153; Dodge v. Burlington, &c. Rld. 34 Iowa, 276; Pennsylvania Rld. v. Garvey, 12 Out. Pa. 369; Petty v. Hannibal, &c. Rld. 88 Mo. 306; Palmer v. Detroit, &c. Rld. 56 Mich. 1.

³ Strong v. Sacramento, &c. Rld. 61 Cal. 326; Cranston v. New York Cent. &c. Rld. 39 Hun, 308; Faber v. St. Paul, &c. Ry. 29 Minn. 465; Donohue v. St. Louis, &c. Ry. 91 Mo. 357.

⁴ McGovern v. New York, &c. Rld. 67 N. Y. 417.

⁵ Rothrock, J. in Laverenz v. Chicago, &c. Rld. 56 Iowa, 689, 694; Plummer v. Eastern Rld. 73 Maine, 591; Texas, &c. Ry. v. Chapman, 57 Texas, 75.

⁶ Central Trust Co. v. Wabash, &c. Ry. 27 Fed. Rep. 159; Spencer v. Illinois Cent. Rld. 29 Iowa, 55; Ernst v. Hudson River Rld. 35 N. Y. 9. To disregard the signal is negligence. Fox v. Missouri Pac. Ry. 85 Mo. 679.

may sometimes be matter for the jury's consideration, does not justify the traveller in inferring that the crossing is safe.¹

§ 1045. **In Front of Train.**—A horse may become frightened, a footman may stumble, or other like accident may happen during a crossing. Therefore one who sees a train approaching and, by a nice calculation, determines that he has time to pass over in advance of it, is contributorily negligent if he makes the attempt and is injured.² Just how much he must allow for a possible mischance is probably not definable by rule.

§ 1046. **Other Forms.**—While the foregoing are the common forms of contributory negligence at crossings, there are numberless others, less likely to occur.³

§ 1047. **Children.**—Within explanations in a preceding chapter,⁴ some modifications of the foregoing doctrines are required in their application to young children.⁵ Thus, one too immature to be chargeable with negligence⁶ may have his damages, though he did not look up and down the track before attempting to cross.⁷

§ 1048. **Rightful or Wrongful Crossing.**—When one undertakes to cross without right, the doctrines of our first subtitle apply. The road is under no duty of care to him.⁸ A

¹ *McGrath v. New York, &c. Rld.* 59 N. Y. 468; *Pittsburgh, &c. Ry. v. Yundt*, 78 Ind. 373; *French v. Taunton Branch Rld.* 116 Mass. 537; *Berry v. Pennsylvania Rld.* 19 Vroom, 141; *Lindeman v. New York Cent. &c. Rld.* 42 Hun, 306; *McGrath v. New York, &c. Rld.* 63 N. Y. 522.

² *Baltimore, &c. Rld. v. Mali*, 66 Md. 53; *Bellefontaine Ry. v. Hunter*, 33 Ind. 335; *Chicago, &c. Rld. v. Fears*, 53 Ill. 115; *Kelley v. Hannibal, &c. Rld.* 75 Mo. 138; *Rigler v. Charlotte, &c. Rld.* 94 N. C. 604; *Pennsylvania Co. v. Morel*, 40 Ohio State, 338; *Chicago, &c. Rld. v. Jacobs*, 63 Ill. 178.

³ See, for illustrations, *Kennedy v. Chicago, &c. Ry.* 68 Iowa, 559; *Thompson v. New York Cent. &c. Rld.* 33 Hun, 16; *Bonnell v. Delaware, &c. Rld.* 10 Vroom, 189; *Mantel v. Chicago, &c.*

Ry. 33 Minn. 62; *Kelly v. Southern Minn. Ry.* 28 Minn. 98; *Spencer v. Baltimore, &c. Rld.* 4 Mackey, 138; *Geveke v. Grand Rapids, &c. Rld.* 57 Mich. 589; *Lewis v. Baltimore, &c. Rld.* 38 Md. 588; *Philadelphia, &c. Rld. v. Carr*, 3 Out. Pa. 505; *McCrary v. Chicago, &c. Ry.* 31 Fed. Rep. 531; *Scott v. Wilmington, &c. Rld.* 96 N. C. 428; *Pratt Coal, &c. Co. v. Davis*, 79 Ala. 308; *Delaney v. Milwaukee, &c. Ry.* 33 Wis. 67.

⁴ Ante, § 572-590.

⁵ *Finklestein v. New York Cent. &c. Rld.* 41 Hun, 34; *Washington, &c. Rld. v. Gladmon*, 15 Wal. 401; *Elkins v. Boston, &c. Rld.* 115 Mass. 190.

⁶ Ante, § 586.

⁷ *Chicago, &c. Rld. v. Becker*, 84 Ill. 483.

⁸ Ante, § 1036; *Philadelphia, &c.*

traveller may at a grade crossing go over any part of the highway;¹ or, if the railroad obstructs its track,—as, by stopping a train at a crossing,—he may turn aside and cross elsewhere,² and its duty of care to him will continue.³ Or, if a crossing which began in trespass becomes *quasi* public by long user and acquiescence,⁴ the railroad's duty of caution may extend to it.⁵ And the like doctrines, more or less modified, apply in proper circumstances to farm crossings.⁶

§ 1049. **Road's Negligence.**—While thus it appears that the road, whatever the extent of its mere negligence,⁷ will not be responsible if the injured person was contributorily negligent; so also, on the other hand, though such person was to the utmost degree careful, no liability will attach to the road unless it was negligent,—but the accident will pertain to the inevitable, which the sufferer must endure uncompensated.⁸ Assuming, therefore, that such person was duly careful, and was crossing rightfully, any injury to him through the road's omission of a required signal or slackening of speed or the like,⁹

Rld. v. Hummell, 8 Wright, Pa. 375; Matze v. New York Cent. &c. Rld. 3 Thomp. & C. 513, 1 Hun, 417; Sutton v. New York, &c. Rld. 66 N. Y. 243; Morgan v. Pennsylvania Rld. 19 Blatch. 239; Wright v. Boston, &c. Rld. 142 Mass. 296.

¹ Louisville, &c. Ry. v. Head, 80 Ind. 117, 122.

² Ante, § 162.

³ Brown v. Hannibal, &c. Rld. 50 Mo. 461.

⁴ Ante, § 958.

⁵ Barry v. New York Cent. &c. Rld. 92 N. Y. 289; Taylor v. Delaware, &c. Canal, 3 Am. Pa. 162; Byrne v. New York Cent. &c. Rld. 104 N. Y. 362; Delaney v. Milwaukee, &c. Ry. 33 Wis. 67.

⁶ Henderson v. Chicago, &c. Rld. 43 Iowa, 620; Mann v. Chicago, &c. Ry. 86 Mo. 347; Kimes v. St. Louis, &c. Ry. 85 Mo. 611; Moberly v. Kansas City, &c. Ry. 17 Mo. Ap. 518; Illinois Cent. Rld. v. McKee, 43 Ill. 119.

⁷ Ante, § 1040-1042.

⁸ Ante, § 448; Zeigler v. Northeastern Rld. 5 S. C. 221.

⁹ Ante, § 1038; Lake Erie, &c. Ry. v. Zoffinger, 107 Ill. 199; Rockford, &c. Rld. v. Hillmer, 72 Ill. 235; Keim v. Union Ry. &c. Co. 90 Mo. 314; Wabash, &c. Ry. v. Wallace, 110 Ill. 114; Reading, &c. Rld. v. Ritchie, 6 Out. Pa. 425; Bellefontaine Ry. v. Hunter, 33 Ind. 335; Bailey v. New Haven, &c. Co. 107 Mass. 496; Kennayde v. Pacific Rld. 45 Mo. 255; Zeigler v. Northeastern Rld. 5 S. C. 221; Duffy v. Missouri Pac. Ry. 19 Mo. Ap. 380; Sweeny v. Old Colony, &c. Rld. 10 Allen, 368; Texas, &c. Ry. v. Chapman, 57 Texas, 75; Pittsburgh, &c. Ry. v. Yundt, 78 Ind. 373; Funston v. Chicago, &c. Ry. 61 Iowa, 452; Brunswick, &c. Rld. v. Hoover, 74 Ga. 426; Chicago, &c. Rld. v. McGaha, 19 Bradw. 342; Johnson v. Chicago, &c. Ry. 77 Mo. 546; Leavenworth, &c. Rld. v. Rice, 10 Kan. 426; Donohue v. St. Louis, &c. Ry. 91 Mo. 357; Huckshold v. St. Louis, &c. Ry. 90 Mo. 548; Indianapolis, &c. Rld. v.

or any other lack of the reasonable precaution indicated by the particular surroundings and facts,¹ will, if harm comes² to the non-negligent person crossing, render the road liable for the damages.

III. *Further Expositions.*

§ 1050. **Analogous Cases.**—There are many cases analogous to those explained in the last two sub-titles, yet differing from them in form. They are governed by the same principles. Thus, —

§ 1051. **Trespasser on Cars.**—To a trespasser on a car, the same as on the track,³ the corporation owes no duty of carefulness. It is required simply, as said in one case, “not to injure him wantonly or wilfully, or by such gross and reckless negligence in the management of the car, after the discovery that he was upon it, as would be equivalent to intentional mischief.”⁴ This rule is modified in favor of children too young for contributory negligence;⁵ but, where a boy of eight, who had been repeatedly warned, mounted unseen an engine and jumped off after it began to move, sustaining injury, the road was held not to be responsible.⁶ The same was adjudged where another boy of eight, of more than the average intelligence, after repeated warnings, got on the step of an engine; and, being ordered off, jumped as it started, and it went over

Hamilton, 44 Ind. 76; Scanlan v. Boston, 140 Mass. 84.

¹ Webb v. Portland, &c. Rld. 57 Maine, 117; Maginnis v. New York Cent. &c. Rld. 52 N. Y. 215; Kissenger v. New York, &c. Rld. 56 N. Y. 538; Chicago, &c. Ry. v. Ryan, 70 Ill. 211; Kelly v. St. Paul, &c. Ry. 29 Minn. 1; Richardson v. New York Cent. Rld. 45 N. Y. 846; Pennsylvania Rld. v. Coon, 1 Am. Pa. 430; Thomas v. Delaware, &c. Rld. 19 Blatch. 533; Vicksburg, &c. Rld. v. Alexander, 62 Missis. 496; Texas, &c. Ry. v. Lowry, 61 Texas, 149; Indianapolis, &c. Rld. v. Stables, 62 Ill. 313; Bunting v. Central Pac. Rld. 16 Nev. 277.

² Stepp v. Chicago, &c. Ry. 85 Mo. 229.

³ Ante, § 1036, 1037.

⁴ St. Louis, &c. Ry. v. Ledbetter, 45 Ark. 246, 251, opinion by Smith, J.; Darwin v. Charlotte, &c. Rld. 23 S. C. 531; Everhart v. Terre Haute, &c. Rld. 78 Ind. 292.

⁵ Ante, § 1047, and places there referred to; Indianapolis, &c. Ry. v. Pitzer, 109 Ind. 179; Schmidt v. Kansas City Dist. Co. 90 Mo. 284; Woodbridge v. Delaware, &c. Rld. 9 Out. Pa. 460.

⁶ Murray v. Richmond, &c. Rld. 93 N. C. 92. See Chicago, &c. Rld. v. Lammert, 12 Bradw. 408.

him; the servants of the road not having acted wantonly or recklessly.¹ On the other hand, if its servants throw a trespasser² or compel him to jump³ from a moving train, it will be answerable for the harm befalling him; since they resorted to an unjustifiable and dangerous force.⁴

§ 1052. *Torpedo*. — Should a railroad company, to protect its track from trespassers, lay a torpedo with the view to its exploding and injuring them, it would be civilly or criminally chargeable with whatever harm followed; the case being within explanations in a preceding chapter.⁵ But where the torpedo was placed as a danger-signal, and a trespasser picked it up and was killed while handling it, the road was adjudged to be not liable.⁶

§ 1053. *Crawling under Cars* — that are halting in a street is contributory negligence.⁷

§ 1054. *The Doctrine of this Chapter restated.*

The distinction, pointed out in a preceding chapter,⁸ between trespassers and persons lawfully on land, in their relations with the owner, extends also to railroads. The managers of a road owe the duty of an affirmative carefulness to those rightfully on its track or its cars, or otherwise in lawful contact with it. But there is no duty due from them to a trespasser; while yet negatively they are not entitled, in return for his trespass, to inflict on him a wilful or wanton harm. Not even contributory negligence in the person injured will relieve them from responsibility for the latter, whether inflicted on a trespasser or on a person not trespassing. But injuries from mere negligence are not actionable, if the injured party's negligence contributed to that of which he complains.

¹ Chicago, &c. Ry. v. Smith, 46 Mich. 504.

⁵ Ante, § 847.

² Carter v. Louisville, &c. Ry. 98 Ind. 552.

⁶ Carter v. Columbia, &c. Rld. 19 S. C. 20.

³ Kansas City, &c. Rld. v. Kelly, 36 Kan. 655; Wabash Ry. v. Savage, 110 Ind. 156.

⁷ Chicago, &c. Rld. v. Sykes, 1 Bradw. 520; Central Rld. &c. Co. v. Dixon, 42 Ga. 327.

⁴ Ante, § 846, 847. And see Kline v. Central Pac. Rld. 37 Cal. 400.

⁸ Ante, § 845-854.

It is the ordinary doctrine of negligence, which was explained in a preceding chapter,¹ applied to the special topic of this chapter. And this entire chapter consists only of particular applications of doctrines previously stated in this volume. Whence we have a hint of the broader truth, that the doctrines of the law are comparatively few, while their applications are multitudinous; so that the only practical way to become a competent lawyer is to acquire the doctrines, and in connection with them, not the impossible remembrance of their infinite prior applications, but the skill to apply them to whatever facts may hereafter arise.

¹ Ante, § 433-484.

CHAPTER XLIV.

TRAVELLING BY RAIL.

§ 1055. Introduction.

1056-1065. General Liabilities as Passenger Carriers.

1066-1071. Servants and Imputed Negligence.

1072-1084. Tickets and Bargainings about Fares.

1085-1109. Travel and its Rights and Obligations.

1110. Connecting Lines.

1111. Third Persons, &c. Injuring Passengers.

1112-1114. Sleeping and Palace Cars.

1115. Doctrine of Chapter restated.

§ 1055. **How Chapter divided.** — We shall consider, I. In General of the Liabilities of Railroads as Carriers of Passengers; II. Servants and the Imputed Negligence of other Persons; III. Tickets and the Bargainings about Fares; IV. The Act of Travel and its Rights and Obligations; V. Connecting Lines; VI. Third Persons and Corporations Injuring Passengers; VII. Sleeping and Palace Cars.

I. In General of the Liability of Railroads as Carriers of Passengers.

§ 1056. **Railroads** — are, in addition to their other functions, common carriers of passengers.¹

§ 1057. **Common Carrier.** — The term “common carrier,” used thus without qualification, ordinarily denotes a common carrier of goods, — one who for hire carries them, or a particular class of them, for all persons indifferently.² A common

¹ Contra Costa, &c. Rld. v. Moss, 23 v. Brown, 3 Wend. 158, 161; Gisbourn Cal. 323. v. Hurst, 1 Salk. 249; Garton v. Bristol, &c. Ry. 1 Best & S. 112; Mershon

² 2 Kent Com. 597, 598; Orange Bank

carrier of passengers is one who carries, or holds himself out as carrying, for hire, over a known or designated route, all persons applying.¹ Whereupon, by operation of law, —

§ 1058. **Under Duty.** — The common carrier, whether of goods or passengers, occupies a position like that of "Persons assuming special skill," explained in a preceding chapter.² He is under a duty defined and imposed by the law. So that, irrespective of any obligations of contract, which those injured may enforce or not at their election,³ there is upon him the law-created duty, a breach whereof is a species of deceit,⁴ justifying an action of tort in the form known at common law as case,⁵ to all persons seeking his services, to do what is legally incumbent on a common carrier of the particular sort which he holds himself out as being.⁶ Thus, —

§ 1059. **Provide Conveyance.** — The carrier of passengers must be duly diligent to run his vehicles as promised to the public. So that a person going to the depot of a railroad to take an advertised train may, if without a valid excuse it does not send out the train,⁷ or does not cause a train to stop for passengers as advertised,⁸ recover of the road whatever damage he has suffered. But he cannot found a claim on an accidental delay of a train, proceeding from no lack of carefulness or skill.⁹ So also, —

§ 1060. **Refusing Passage.** — The refusing of a passage, to one entitled to it, is an actionable wrong.¹⁰ And, —

§ 1061. **Who demand Passage.** — In general terms, all persons seeking a passage are equally entitled to it, on conforming to such reasonable conditions as are imposed on all

v. Hobensack, 2 Zab. 372; *Fish v. Staten Island Rld.* 58 N. Y. 126, 133, Chapman, 2 Kelly, 349; *Samms v.* 134; *Saltonstall v. Stockton, Taney*, 11; *Lake Erie, &c. Ry. v. Acres*, 108 Stewart, 20 Ohio, 69.

¹ *Verner v. Sweitzer*, 8 Casey, Pa. Ind. 548.
208; *Bennett v. Dutton*, 10 N. H. 481; ⁷ Ante, § 329; *Savannah, &c. Rld.*
Hollister v. Nowlen, 19 Wend. 234, 239. *v. Bonaud*, 58 Ga. 180.

² Ante, § 697-717.

³ Ante, § 72-74.

⁴ Ante, § 698.

⁵ Ante, § 313.

⁶ *Bretherton v. Wood*, 9 Price, 408, ⁸ *Indianapolis, &c. Ry. v. Birney*,
3 Brod. & B. 54, 62; *Hollister v. Nowlen*, 19 Wend. 234, 239; *Carroll v.* 71 Ill. 391.
⁹ *Gordon v. Manchester, &c. Rld.* 52 N. H. 596.

¹⁰ *Lake Erie, &c. Ry. v. Acres*, 108 Ind. 548; *Hollister v. Nowlen*, 19 Wend. 234, 239.

applicants alike.¹ The limits of this duty are probably not made quite definite by authority. Certainly a railroad could not be compelled to carry a person escaping from a lawful imprisonment for crime; for such assistance, knowingly rendered, would be itself a crime.² Nor would it be required to transport one having a contagious disease, liable to be communicated to other passengers; for thus it would violate its duties to them, and there can be no conflict of duties.³ Nor yet is the road under a duty, or even permitted, to carry a passenger whose presence will endanger either the safety or the reasonable comfort of the other passengers; within which rule, drunkenness is not necessarily, but in the particular instance it may be, a disqualification in the applicant.⁴ And the road may protect itself; as, by refusing to carry one on a business directly injurious to its own.⁵

§ 1062. **Vehicle Full.** — The proprietor of a stage coach cannot be made to pay damages for not taking a passenger after his vehicle is full, and his means of carriage are exhausted.⁶ But it is plainly the duty of our railroads to exercise foresight and anticipate emergencies, and a road could not often excuse itself on the ground that it had no more room in its cars.⁷

§ 1063. **Safety.** — The familiar rules as to the responsibility for goods committed to a common carrier do not extend to passengers; the carrier is not an insurer of their safety. His liability arises only out of his fault, or the want of care termed in the law negligence.⁸ Now, —

¹ *Saltonstall v. Stockton*, Taney, 11; *Day v. Owen*, 5 Mich. 520; *Chicago, &c. Ry. v. Williams*, 55 Ill. 185; *Bennett v. Dutton*, 10 N. H. 481; *Peck v. Cooper*, 112 Ill. 192; *The State v. Delaware, &c. Rld.* 19 Vroom, 55.

² 2 Bishop Crim. Law, § 1065, 1066, 1102; 1 lb. § 693, 695; *Thurston v. Union Pac. Rld.* 4 Dil. 321.

³ Ante, § 268, 269, 414.

⁴ *Putnam v. Broadway, &c. Rld.* 55 N. Y. 108; *Milliman v. New York, &c. Rld.* 66 N. Y. 642; *Thurston v. Union Pac. Rld.* supra; *Pittsburg, &c. Rld. v. Pillow*, 26 Smith, Pa. 510.

⁵ *Thurston v. Union Pac. Rld.* supra; *The D. R. Martin*, 11 Blatch. 233.

⁶ *Bennett v. Dutton*, 10 N. H. 481, 486.

⁷ See *Tarbell v. Central Pac. Rld.* 34 Cal. 616.

⁸ *Christie v. Griggs*, 2 Camp. 79; *Harris v. Costar*, 1 Car. & P. 636; *Readhead v. Midland Ry.* Law Rep. 2 Q. B. 412, 4 Q. B. 379; *Aston v. Heaven*, 2 Esp. 533; *Kentucky Cent. Rld. v. Thomas*, 79 Ky. 160; *Crofts v. Waterhouse*, 3 Bing. 319, 11 Moore, 133; *Sherlock v. Alling*, 44 Ind. 184; *Brunswick, &c. Rld. v. Gale*, 56 Ga. 322; *Gilson v.*

§ 1064. **Degree of Care.** — We have seen, in previous connections, that the care which will exclude the negligence of the law must increase with the magnitude of the interest and with the danger.¹ And there is no interest so high as human welfare and especially human life.² So that, before railroads came, the coach-proprietor was said to be “answerable for the smallest negligence” in the driver; as, where he drove “with reins so loose that he could not readily command his horses.”³ A coach drawn by a steam engine is a more powerful, therefore presumptively a more dangerous, vehicle than one drawn by horses, and more dangerous in some circumstances than in others; and the care should be proportioned to the danger,⁴ arising to the highest possible.⁵ Only in such general terms can the different degrees of care be distinguished. The lowest, to be adequate, must be very high; and the usual defining scarcely leaves space for a higher. It is, that the common carrier of passengers must exercise the utmost care and foresight, sometimes expressed to be extraordinary care, sometimes the highest diligence, to carry them safely, and the slightest neglect will charge him.⁶ Ordinary diligence will not suffice.⁷ And, —

§ 1065. **Presumption.** — Within explanations in a preceding chapter,⁸ an injury to the passenger not in fault is commonly

Jackson County Horse Ry. 76 Mo. 282; *Meier v. Pennsylvania Rld.* 14 Smith, Pa. 225.

¹ Ante, § 438-441, 645, 646, 840, 843, 1013, 1023.

² *Sandham v. Chicago, &c. Rld.* 38 Iowa, 88.

³ *Aston v. Heaven*, 2 Esp. 533, 535.

⁴ *Klein v. Jewett*, 11 C. E. Green, 474.

⁵ *Baltimore, &c. Rld. v. Wightman*, 29 Grat. 431.

⁶ *Indianapolis, &c. Rld. v. Horst*, 93 U. S. 291; *Brunswick, &c. Rld. v. Gale*, 56 Ga. 322; *The Oriflamme*, 3 Saw. 397; *Central Rld. v. Freeman*, 75 Ga. 331; *Gilson v. Jackson County Horse Ry.* 76 Mo. 282; *Taylor v. Grand Trunk Ry.* 48 N. H. 304; *Johnson v. Winona,*

&c. Rld. 11 Minn. 296; *Maury v. Talmadge*, 2 McLean, 157; *Wheaton v. North Beach, &c. Rld.* 36 Cal. 590; *Hall v. Connecticut River Steam Co.* 13 Conn. 319; *Derwort v. Loomer*, 21 Conn. 245; *Edwards v. Lord*, 49 Maine, 279; *Frink v. Potter*, 17 Ill. 406. “As far as human care and foresight will go, that is, to the utmost care and diligence of very cautious persons.” *Maverick v. Eighth Avenue Rld.* 36 N. Y. 378, 381; *Deyo v. New York Cent. Rld.* 34 N. Y. 9; *Bowen v. New York Cent. Rld.* 18 N. Y. 408; *Illinois Cent. Rld. v. Phillips*, 55 Ill. 194.

⁷ *Moore v. Des Moines, &c. Ry.* 69 Iowa, 491.

⁸ Ante, § 443; post, § 1133.

presumed, *prima facie*, to have been caused by the carrier's negligence. But the latter may rebut this presumption by proofs.¹

II. *Servants and the Imputed Negligence of other Persons.*

§ 1066. **Already**, — in preceding chapters, while considering the liabilities of the master to third persons for the acts of his servants,² and the capacity of corporations to commit torts through servants,³ we have had a view of the doctrines which govern this sub-title. Thus, —

§ 1067. **Servant's Acts the Road's**. — Whenever the servants of the road, or persons conducting as such with its apparent authorization,⁴ perform any act within the real or apparent scope of their service, whether a proper and careful act, or a negligent, malicious, or otherwise wrongful one,⁵ the road — that is, the railroad corporation — is responsible for it as its own, whether in fact it had conferred on them the authority or not.⁶ To illustrate, —

§ 1068. **Protection to Passengers — Ill Treatment by Servants**. — The road owes to its passengers care and protection.⁷ Therefore, though it may have committed the discharge of this duty specially to particular servants, or may have omitted to instruct any in it, to outward observation it devolves on the conductor of a passenger train actively to enforce it,⁸ and on all the rest who co-operate in the running of the train to assist him therein,⁹ and to abstain from violating it themselves. So that, if the conductor employs excessive force in

¹ *Pittsburg, &c. Rld. v. Pillow*, 26 Smith, Pa. 510 ; *Hipsley v. Kansas City, &c. Rld.* 88 Mo. 348 ; *Baltimore, &c. Rld. v. Wightman*, 29 Grat. 431.

² Ante, § 599-621.

³ Ante, § 719-737.

⁴ Ante, § 600.

⁵ Ante, § 721-734 ; *Goddard v. Grand Trunk Ry.* 57 Maine, 202 ; *Louisville, &c. Rld. v. Whitman*, 79 Ala. 328 ; *Craker v. Chicago, &c. Ry.* 36 Wis. 657.

⁶ Ante, § 609-616 ; *Bayley v. Manchester, &c. Ry.* Law Rep. 7 C. P. 415, 8 C. P. 148.

⁷ *Sherley v. Billings*, 8 Bush, 147 ; *Union Ry. &c. Co. v. Kallaher*, 114 Ill. 325 ; *Pendleton v. Kinsley*, 3 Clif. 416 ; *Patterson v. Wabash, &c. Ry.* 54 Mich. 91 ; *Chicago, &c. Rld. v. Flexman*, 9 Bradw. 250, 103 Ill. 546.

⁸ *Flannery v. Baltimore, &c. Rld.* 4 Mackey, 111.

⁹ *Sherley v. Billings*, supra.

ejecting a passenger,¹ or ejects him wrongfully,² or assaults him,³ or attempts improper familiarities with a female passenger,⁴ — or if a brakeman or other inferior servant assaults a passenger with or without provocation,⁵ or wrongfully ejects him,⁶ — or if a station agent puts out a trespasser from the station-house with unjustifiable violence,⁷ — the road is responsible without any special showing of authority from it to its servant. Even though the servant in doing the act violated its express command, its liability is the same.⁸ On the other hand, since the conductor's duty to a passenger at the end of his route is discharged by stopping the train and announcing the station, the road has been held not answerable if, having promised to wake him, he neglects to do it, and carries him beyond his destination.⁹ This decision is in line with some others;¹⁰ but as it is plainly the conductor's function to regulate the exit of passengers, it would seem in reason, as between a passenger and the road, competent for him to bind the road by this sort of special arrangement.¹¹

§ 1069. *Servant's Contributory Negligence.* — Whether the master is liable or not for the contributory negligence of a servant acting in his absence independently,¹² there can be no doubt of the liability of one who is present with the servant

¹ *Chicago, &c. Ry. v. Barrett*, 16 Bradw. 17; *Chicago, &c. Rld. v. Bills*, 104 Ind. 13.

² *Travers v. Kansas Pac. Ry.* 63 Mo. 421; *Townsend v. New York Cent. &c. Rld.* 56 N. Y. 295.

³ *Randolph v. Hannibal, &c. Ry.* 18 Mo. Ap. 609; *Ramsden v. Boston, &c. Rld.* 104 Mass. 117.

⁴ *Craker v. Chicago, &c. Ry.* 36 Wis. 657; *Nieto v. Clark*, 1 Clif. 145.

⁵ *Goddard v. Grand Trunk Ry.* 57 Maine, 202; *Chicago, &c. Rld. v. Flexman*, 9 Bradw. 250, 103 Ill. 546; *Stewart v. Brooklyn, &c. Rld.* 90 N. Y. 588; *Hoffman v. New York Cent. &c. Rld.* 87 N. Y. 25.

⁶ *Peck v. New York, &c. Rld.* 8 Hun, 286.

⁷ *Johnson v. Chicago, &c. Ry.* 58 Iowa, 348.

⁸ Ante, § 610; *Philadelphia, &c. Rld. v. Derby*, 14 How. U. S. 468.

⁹ *Nunn v. Georgia Rld.* 71 Ga. 710.

¹⁰ For example, ante, § 613.

¹¹ And compare with *Bellman v. New York Cent. &c. Rld.* 42 Hun, 130, 134, 135; *Shannon v. Boston, &c. Rld.* 78 Maine, 52. In *Marshall v. St. Louis, &c. Ry.* 78 Mo. 610, 616, 617, Hough, C. J. observes: "When any servant of a railroad company, having the requisite authority, misdirects a passenger to his injury, the company should be responsible therefor." And see post, § 1089. Within this doctrine, the conductor of a night train is surely authorized to instruct a passenger whether or not he must be awake, without help from the road, when he reaches the end of his journey.

¹² Ante, § 631-634.

controlling him. Illustrations of this doctrine do not often arise in railroad travelling; but, in private travelling, if a servant drives his master carelessly, and an injury results from a third person's negligence combining with the servant's, the master will evidently be without remedy against the third person.¹ Even, —

§ 1070. **Not Servant — Imputed Contributory Negligence.** — There is a doctrine, maintained in some of the English cases,² and followed in a few American ones, to the effect that a passenger, as well in a public coach as in a private, having no control over the driver, will be barred of his action for injuries proceeding from the negligence of a third person, if the driver's negligence contributed thereto; it being imputed to him, or, as otherwise expressed, he being "identified with the carriage." We have seen that the principle of imputing to an infant the contributory negligence of the adult having the care of him is in reason and by the better authorities unsound.³ *A fortiori*, this making an adult person answerable for the negligence of a driver whom he did not select, and over whom he has no particle of control, has no relation to the ordinary justice of the law; and, though it is followed in some of our courts, it is repudiated by most.⁴ The absurdity

¹ I believe this undisputed, but it has not been much litigated directly. See cases next section. If one in a carriage joins the driver in negligence, it will bar both. *Crescent v. Anderson*, 4 Am. Pa. 643.

² The leading English case is *Thorogood v. Bryan*, 8 C. B. 115, 130. Overruled in *Mills v. Armstrong*, 13 Ap. Cas. 1, following *Little v. Hackett*, *infra*.

³ Ante, § 581-583.

⁴ The case of *Little v. Hackett*, 116 U. S. 366, rejecting the doctrine, and holding that the hirer of a public hack, who exercises no control over the driver, is not barred by the latter's contributory negligence, is particularly full and instructive. It largely collects the authorities. I shall not render the reader any service by classifying them, so I simply add *Houfe v. Fulton*, 29

Wis. 296; *Prideaux v. Mineral Point*, 43 Wis. 513; *Robinson v. New York Cent. & Rld.* 66 N. Y. 11; *New York, & C. Rld. v. Steinbrenner*, 18 Vroom, 161 (wherein, at p. 166, Depue, J. observes: "*Thorogood v. Bryan* has been directly repudiated in the English court of admiralty, *The Milan*, Lush. 388; *Chartered Mercantile Bank v. Netherlands, & C. Nav. Co.* 9 Q. B. D. 118, 10 Q. B. D. 521, 545, and is generally cited in the common-law courts, simply as a case that has not been overruled"); *Payne v. Chicago, & C. Ry.* 39 Iowa, 523; *Albion v. Hetrick*, 90 Ind. 545; *Lake Shore, & C. Rld. v. Miller*, 25 Mich. 274; *Masterson v. New York Cent. & C. Rld.* 84 N. Y. 247; *Metcalf v. Baker*, 11 Abb. Pr. N. S. 431; *St. Clair Street Ry. v. Eadie*, 43 Ohio State, 91; *Bennett v. New Jersey Rld. & C. Co.* 7 Vroom, 225;

of this unjust doctrine would glaringly appear if applied to —

§ 1071. *Steam and Horse Railroads.* — It has been uniformly held that the contributory negligence of the servants running a steam or horse railroad is not to be imputed to a passenger, so as to deprive him of redress for an injury inflicted by a third party.¹ To admit such a defence, while it would carry the mutual responsibilities of men for one another's sins and weaknesses to the point of making plain the antagonism of the principle to the fundamental right of the common law, would be simply a particular application of the minority doctrine of the last section.

III. *Tickets and other Bargainings about Fares.*

§ 1072. *Rules and Usages — (By-laws — Contracting).* — One carrying on any business may regulate it by rules and usages; but they must be reasonable, and not violative of the law or of public policy. Thereupon another who, knowing them, contracts with him, will be presumed to have them in contemplation, so will be bound by them.² This doctrine is fully applicable to railroad corporations.³ Another power, which more or less blends with this, and is limited in the same way, is that of making by-laws, inherent in business corporations similarly to municipal.⁴ These powers, and the

Webster v. Hudson River Rld. 38 N. Y. 260; *Follman v. Mankato*, 35 Minn. 522; *Philadelphia, &c. Rld. v. Hogleland*, 66 Md. 149; *Carlisle v. Brisbane*, 3 Am. Pa. 544; *Cleveland, &c. Rld. v. Manson*, 30 Ohio State, 451; *Crescent v. Anderson*, 4 Am. Pa. 643.

¹ *Chapman v. New Haven Rld.* 19 N. Y. 341; *McCallum v. Long Island Rld.* 38 Hun, 569; *Louisville, &c. Rld. v. Case*, 9 Bush, 728; *Tompkins v. Clay Street Rld.* 66 Cal. 163; *Cray v. Philadelphia, &c. Rld.* 23 Blatch. 263; *Union Ry. &c. Co. v. Shacklett*, 19 Bradw. 145; *Wabash, &c. Ry. v. Shacklett*, 105 Ill. 364; *Bennett v. New Jersey Rld. &c. Co.* 7 Vroom, 225.

² *Bishop Con.* § 458, and the accompanying elucidations.

³ *Ante*, § 719, 736; *Chicago, &c. Ry. v. People*, 56 Ill. 365; *Commonwealth v. Power*, 7 Met. 596; *Dietrich v. Pennsylvania Rld.* 21 Smith, Pa. 432; *Bass v. Chicago, &c. Ry.* 36 Wis. 450; *De Lucas v. New Orleans, &c. Rld.* 38 La. An. 930; *Crawford v. Cincinnati, &c. Rld.* 26 Ohio State, 580; *Chicago, &c. Ry. v. Williams*, 55 Ill. 185; *Browning v. Long Island Rld.* 2 Daly, 117.

⁴ 2 *Kent Com.* 277, 278; *Norris v. Staps*, Hob. 210 b, 211 a; *The State v. Tudor*, 5 Day, 329; *Hastings v. Blue Hill Turnp.* 9 Pick. 80.

restrictions upon them, are sometimes varied or made more distinct by statutes. A rule, to become an element in one's contract with the road, must be actually or presumptively known by him.¹ And,—

§ 1073. **Other Contracting.** — In the carriage of passengers, railroads contract with them, and upon the same principles which govern other contracts. One of which principles, often invoked, is, that all agreements between parties to do a thing prohibited by law, or subversive of any public interest which the law cherishes, are void.² Thus,—

§ 1074. **Responsibility for Negligence — Contract Limiting.** — It is the duty of men, whether individual or corporate, as we have many times had occasion to consider, to manage their own affairs carefully and circumspectly for the avoidance of injury to others; and a neglect of this duty, resulting in harm to any person, places them under an obligation from the law to compensate him. This is one of the most important of the fundamental doctrines of non-contract right and wrong. It is a clear and unmutilated excerpt from natural justice itself, handed down by God, and requiring no manipulations by man to adapt it to human use. In almost every chapter of this volume, we have seen its beneficent workings. If it has not found a place among the limitations of legislative power in our written constitutions, the reason is, not its unworthiness, but the confidence of their makers that no legislator or judge will be so unmindful of the proper functions of his office as to disregard it. Such, therefore, is both the policy of the law and the law itself, in the highest sense fundamental and unyielding. The result of which is, that, in just legal reason, it will under no circumstances be competent for a railroad or other common carrier, whether of goods or passengers, to cast off this responsibility by any resort to a by-law, to a usage, or even to an express contract with the party. Particularly in the carriage of passengers, if the road could by contract

¹ Bishop Con. § 451, 458; Maroney &c. Rld. 57 N. Y. 382; Lake Shore, v. Old Colony, &c. Ry. 106 Mass. 153; &c. Ry. v. Rosenzweig, 3 Am. Pa. 519.
Lake Shore, &c. Ry. v. Greenwood, 29
² Bishop Con. § 470.
Smith, Pa. 373; Eaton v. Delaware,

exempt itself from responsibility for its own negligence, its next step would be to refuse all passengers who would not enter into the contract; thereupon the railroad corporations, freed from the only motive to carefulness which they could appreciate, the danger of being mulcted in damages, would conduct their business with a recklessness rendering travel a horror to every person not permitted to remain at home. Looking now to the adjudications,—

§ 1075. **As to Goods.**—It is almost universally held that no common carrier of goods can, by any bargaining with their owner, become free from responsibility for the negligence of himself and his servants in their carriage.¹ But there are courts in which this doctrine is not admitted, or not adhered to with the strictness which the principles above stated require.² *A fortiori*,—

§ 1076. **As to Passengers.**—Ordinarily the courts refuse to give effect to any stipulation between the road and a passenger relieving it from liability to him for the negligence of itself or servants.³ For example, where a drover accepted a ticket indorsed with the following words, which he signed,—“In consideration of receiving this ticket, I voluntarily assume all risk of accidents; and expressly agree that the company shall not be liable, under any circumstances, whether by negligence of their agents, or otherwise, for any injury to my person, or for any loss or injury to my property; and I agree that as for me, in the use of this ticket, I will not consider the company as common carriers, or liable to me as such,”—the indorsement was held to be void, and the road responsible to

¹ New York Cent. Rld. v. Lockwood, 17 Wal. 357; Shriver v. Sioux City, &c. Rld. 24 Minn. 506; Berry v. Cooper, 28 Ga. 543; Evansville, &c. Rld. v. Young, 28 Ind. 516; Ashmore v. Pennsylvania, &c. Co. 4 Dutcher, 180; Pennsylvania Rld. v. McCloskey, 11 Harris, Pa. 526; Farnham v. Camden, &c. Rld. 5 Smith, Pa. 53; American Express v. Sands, 5 Smith, Pa. 140; Pennsylvania Rld. v. Butler, 7 Smith, Pa. 335; Southern Express v. Moon, 39 Missis. 822; Indianapolis, &c. Rld. v. Allen,

31 Ind. 394; Michigan, &c. Rld. v. Heaton, 31 Ind. 397, note. As to the English law, see Peek v. North Staffordshire Ry. 10 H. L. Cas. 473, 9 Jur. n. s. 914.

² Mynard v. Syracuse, &c. Rld. 71 N. Y. 180; Baltimore, &c. Rld. v. Rathbone, 1 W. Va. 87; Canfield v. Baltimore, &c. Rld. 93 N. Y. 532.

³ New York Cent. Rld. v. Lockwood, 17 Wal. 357, and the numerous cases reviewed and cited in the opinion; Rose v. Des Moines Valley Rld. 39 Iowa, 246.

him for an injury suffered through its negligence.¹ There are a few cases which reject this doctrine,² or reject it in its unqualified form; therefore in some circumstances permitting the road to relieve itself by contract.³ An examination of these cases will disclose, that a gratuitous carriage,⁴ or one at a reduced rate,⁵ is by some deemed a foundation for giving effect to this sort of special bargain. But in preceding chapters we saw that the distinction between the liability and non-liability of one for accidents through his negligence to persons coming on his premises depends upon whether they are there rightfully or as trespassers; if the former, he is answerable; if the latter, he is not.⁶ Therefore, since the law is a system of reasoning, and it cannot contradict itself, the distinction as to the passenger carrier's exemption by agreement, thus propounded, has no place in our legal system; yet, instead of it, the true doctrine is, that while the road cannot cast off its obligations to one whom it permits to ride in its cars, it owes no duty to a trespasser, and no bargaining is required to relieve it from damages for accidents to him through its negligence.

§ 1077. **Tickets.** — A railroad ticket is an informal memorandum⁷ contract, largely interpreted by usage⁸ and rules of the road,⁹ sometimes supplemented by written words; and,

¹ *Ohio, &c. Ry. v. Selby*, 47 Ind. 471. The contrary was taken for granted in *McCawley v. Furness Ry.* Law Rep. 8 Q. B. 57.

² *Seybolt v. New York, &c. Rld.* 95 N. Y. 562, 573. "The doctrine is settled in this court that railroad companies may, by contract, exempt themselves from liability on account of the negligence of their servants, other than that which is gross and wilful." *Arnold v. Illinois Cent. Rld.* 83 Ill. 273.

³ *Kinney v. Central Rld.* 5 Vroom, 513; and cases cited in *New York Cent. Rld. v. Lockwood*, 17 Wal. 357.

⁴ *Grand Trunk Ry. v. Stevens*, 95 U. S. 655, 660. *Jacobus v. St. Paul, &c. Ry.* 20 Minn. 125; holds the agreement in a gratuitous carriage to be no

protection to the road from liability for gross negligence. "Having undertaken to carry, the duty arises to carry safely." *Berry, J.* at p. 128. *Contra, Griswold v. New York, &c. Rld.* 53 Conn. 371.

⁵ *Bissell v. New York Cent. Rld.* 25 N. Y. 442.

⁶ *Ante*, § 845, 848, 849, 851-854, 876, 927, 1036, 1040, 1048.

⁷ *Bishop Con.* § 168, 1242; *Elmore v. Sands*, 54 N. Y. 512.

⁸ *Bishop Con.* § 378, 449.

⁹ *Ante*, § 1072; *Dietrich v. Pennsylvania Rld.* 21 Smith, Pa. 432; *Maples v. New York, &c. Rld.* 38 Conn. 557; *Lake Shore, &c. Ry. v. Rosenzweig*, 3 Am. Pa. 519.

when not supplemented so, commonly admitting of being extended,¹ yet not contradicted, by oral ones.² In the absence of terms rendering it non-assignable,³ it passes from hand to hand by delivery. It is deemed in law, as it is in fact, a thing of value; forgery⁴ or larceny⁵ may be committed of it, it is a chattel,⁶ and it may be the subject of a criminal false pretence.⁷ These general propositions do not admit of reduction to forms greatly more distinct; but something will be attempted, thus,—

§ 1078. **Right to ride on Ticket.**—The road is responsible whenever a conductor, whether by mistake or design, withholds from a ticket-holder the ride which the ticket promises; as, where he accidentally punches the wrong coupon and a second conductor refuses to honor it,⁸ or takes up the ticket and a second conductor puts off the passenger as being without a ticket,⁹ and other cases within the like principle.¹⁰ A freight train, for further example, was accustomed to take passengers to a particular station, to which there was no other

¹ *Pittsburgh, &c. Ry. v. Nuzum*, 50 Ind. 141.

² *Bishop Con.* § 164, 167, 172. In *Howard v. Chicago, &c. Rld.* 61 Missis. 194, it was held that the terms of an excursion ticket "good on train and date stamped on back hereof" could not be varied by the advertisement of the excursion, to entitle the holder to return on a later day. Said Campbell, C. J. p. 198;—"When a ticket does not purport to be a complete agreement between the carrier and the passenger, suppletory evidence is admissible to show that there was a further contract than is indicated by the ticket; but when it sets out the terms of a special contract, it is to be looked to as the evidence of the contract and is conclusive as to its terms." The ticket in controversy was deemed to be of the latter sort. But obviously, within distinctions to be stated in the next section, the conductor must be permitted to rely on the properly interpreted terms of any ticket. A ticket supplemented by a passenger's

interpretation, drawn from sources not known to the conductor, would be too uncertain for practical use. At the same time, the corporation would be holden by the "further contract" thus spoken of by the learned judge.

³ *Post v. Chicago, &c. Rld.* 14 Neb. 110; *Chicago, &c. Ry. v. Bannerman*, 15 Bradw. 100.

⁴ 2 *Bishop Crim. Law*, § 546.

⁵ *Ib.* § 841 *a*.

⁶ *Bishop Stat. Crimes*, § 344.

⁷ 2 *Bishop Crim. Law*, § 477, note; *Reg. v. Boulton*, 1 Den. C. C. 508, 2 Car. & K. 917.

⁸ *Philadelphia, &c. Rld. v. Rice*, 64 Md. 63.

⁹ *Pittsburg, &c. Ry. v. Hennigh*, 39 Ind. 509; *Townsend v. New York, &c. Rld.* 6 Thomp. & C. 495, 4 Hun, 217; *Palmer v. Charlotte, &c. Rld.* 3 S. C. 580.

¹⁰ *Lake Erie, &c. Ry. v. Fix*, 88 Ind. 381; *Hufford v. Grand Rapids, &c. Ry.* 53 Mich. 118; *Toledo, &c. Ry. v. McDonough*, 53 Ind. 289. See post, § 1096.

mode of conveyance. One bought a ticket to this station, but before the train started was told by the conductor that it would not stop there; yet, relying on his ticket, he boarded the train and was carried to the next station beyond. The road was compelled to pay him damages.¹ On the other hand, the passenger, as between himself and the conductor or the road, with respect to the right of riding on the ticket, can claim nothing beyond what it in terms grants;² thus, where a man bought a non-transferable ticket for his wife, and it was made out with the name prefixed by *Mr.*, instead of *Mrs.*, and the conductor refusing to honor it put her off the train, the road was held not to be responsible,³ while yet it is plain that the purchaser did not lose his money, but the road could be compelled in some form to rectify the mistake. And where, by the carelessness of the ticket agent, a passenger receives a ticket which after he has started he discovers to be to a station short of the one to which he paid, he cannot have damages of the road if the conductor refuses to carry him through; his remedy being to pay the extra fare, then reclaim it of the company.⁴ These distinctions result from the obvious fact that our railroads could never carry on their business safely or properly if the conductors of the trains were compellable to alter the terms of tickets to accord with the statements of stranger passengers. This will further appear from some —

§ 1079. **Other Illustrations.** — One bought of a railroad company a ticket which did not limit him to any particular train. But, unknown to him,⁵ the company had a rule excluding passengers who held this sort of ticket from certain of its trains. Taking one of the latter, he was put off by the conductor, and the court subjected the road to damages.⁶ The

¹ Chicago, &c. Rld. v. Fisher, 66 Ill. 152. See Fink v. Albany, &c. Rld. 4 Lans. 147.

² Frederick v. Marquette, &c. Rld. 37 Mich. 342. Compare with Burnham v. Grand Trunk Ry. 63 Maine, 298.

³ Chicago, &c. Ry. v. Bannerman, 15 Bradw. 100.

⁴ Frederick v. Marquette, &c. Rld. supra. Similar are Bradshaw v. South Boston Rld. 135 Mass. 407, and Chicago, &c. Rld. v. Griffin, 68 Ill. 499.

⁵ Ante, § 1072.

⁶ Maroney v. Old Colony, &c. Ry. 106 Mass. 153.

unexplained ticket gave him the right to ride on the train he took, he had bought it without the explanation; and, though the conductor did his duty to his employer, the employer violated its obligation to the passenger. The agent of a road sold to a passenger a punched ticket, assuring him it was good; on its face it was good, but by a rule of the corporation the hole in it took away its validity. The conductor expelled him from the cars, and the corporation was held to be liable. If this ticket had been invalid on its face, the result would have been otherwise.¹ One bought a thousand miles ticket. Unknown and without notice to him, there was on the back of it a condition, which he was to sign, exempting the road from responsibility for injuries which he might suffer from its negligence; and there was a direction to the conductors not to honor the ticket unless he signed the condition. But it was several times honored. Then a conductor, requesting him to sign it, on his refusal expelled him from the cars. The court subjected the road to damages on the ground that it had waived the condition, and the unsigned ticket was good.² Leaving now these illustrations, —

§ 1080. **Rule requiring Ticket.** — It is competent for the road, in the orderly conduct of its business, and to protect itself from imposition, to require passengers to purchase tickets before taking their seats in its cars.³ And they may enforce this rule by the further provision that, on non-compliance, they shall pay in the cars a larger fare;⁴ or even, by the still severer one, if duly made known to a passenger,⁵ that he shall be expelled though he tenders whatever fare to the conductor.⁶

¹ *Murdock v. Boston, &c. Rld.* 137 Mass. 293.

² *Kent v. Baltimore, &c. Rld.* 45 Ohio State, 284. And see *Elliott v. Western, &c. Rld.* 58 Ga. 454.

³ *Pullman Palace Car Co. v. Reed*, 75 Ill. 125; *Frederick v. Marquette, &c. Rld.* 37 Mich. 342; *Elmore v. Sands*, 54 N. Y. 512; *Toledo, &c. Rld. v. Patterson*, 63 Ill. 304. See *Avey v. Atchison, &c. Rld.* 11 Kan. 448.

⁴ *Swan v. Manchester, &c. Rld.* 132 Mass. 116; *The State v. Goold*, 53

Maine, 279; *Cincinnati, &c. Rld. v. Skillman*, 39 Ohio State, 444; *Indianapolis, &c. Ry. v. Rinard*, 46 Ind. 293.

⁵ Ante, § 1072.

⁶ *Lane v. East Tennessee, &c. Rld.* 5 Lea, 124; *Illinois Cent. Rld. v. Nelson*, 59 Ill. 110; *Jones v. Wabash, &c. Ry.* 17 Mo. Ap. 158; *Indianapolis, &c. Rld. v. Kennedy*, 77 Ind. 507; *Lake Shore, &c. Ry. v. Greenwood*, 29 Smith, Pa. 373; *Falkner v. Ohio, &c. Ry.* 55 Ind. 369.

But, as the passenger has the absolute right to be carried,¹ a provision of this sort will be reasonable and just,²—in other words, valid and binding on the passenger,—only if due opportunity is given him for the purchase of the ticket; otherwise, he is entitled to make payment to the conductor in the cars at the lowest rate.³ A due opportunity would seem to require the ticket office to be open seasonably before and down to the time when the train leaves; for, at the starting of a train from the depot, if there is room in it, any fit person who will pay the fare is entitled to a passage.⁴ Still it has been adjudged, perhaps correctly as applied to the facts of most cases,⁵ that the ticket office need be open only to the advertised time for starting,⁶—a doctrine which deprives the traveller of the *right* to ride in belated cars. We have some statutes which provide that the office shall be open to the time of the train's actual departing.⁷ And, aside from the statutes, there may be some judicial differences on this general question.⁸

§ 1081. **What Train.**—It is matter of universal knowledge that not all freight trains carry passengers, and that passenger trains do not all stop at every station. The road advertises the times and stopping-places of its several trains; of which, it has been said, the passenger should inform himself.⁹ And this is believed to be the just and commonly accepted

¹ Ante, § 1060.

² Ante, § 1072.

³ *Forsee v. Alabama Great So. Rld.* 63 Missis. 66; *White v. Chesapeake, &c. Ry.* 26 W. Va. 800; *St. Louis, &c. Rld. v. Dalby*, 19 Ill. 353; *Chicago, &c. Rld. v. Flagg*, 43 Ill. 364; *Du Laurus v. St. Paul, &c. Rld.* 15 Minn. 49; *St. Louis, &c. Ry. v. Myrtle*, 51 Ind. 566; *Illinois Cent. Rld. v. Johnson*, 67 Ill. 312; *Jeffersonville Rld. v. Rogers*, 38 Ind. 116. It is the same where the road has wrongfully refused to sell the passenger a ticket. *Indianapolis, &c. Ry. v. Rinard*, 46 Ind. 293.

⁴ Ante, § 1060-1062.

⁵ How if a train is habitually late, and the traveller knows it? Must he throw away a few hours at the com-

pany's depot, or be deprived of the law-given privilege of being carried in its train?

⁶ *Swan v. Manchester, &c. Rld.* 132 Mass. 116, 118, 119; *St. Louis, &c. Rld. v. South*, 43 Ill. 176.

⁷ *Missouri Pac. Ry. v. McClanahan*, 66 Texas, 530; *Nellis v. New York Cent. Rld.* 30 N. Y. 505; *Everett v. Chicago, &c. Ry.* 69 Iowa, 15.

⁸ *Crocker v. New London, &c. Rld.* 24 Conn. 249.

⁹ *Lake Shore, &c. Ry. v. Rosenzweig*, 3 Am. Pa. 519; *Ohio, &c. Ry. v. Applewhite*, 52 Ind. 540; *Duling v. Philadelphia, &c. Rld.* 66 Md. 120. Compare with ante, § 1079; *Maroney v. Old Colony, &c. Ry.* 106 Mass. 153.

doctrine as applied to cases in which the road has given due notice, and fully done its duty in the arranging of its trains, and in the directing of passengers to them.¹ So that, for example, if one without excuse for mistaking takes passage in a train which does not stop at the station indicated by his ticket, he can have no redress when compelled by the conductor to pay the additional fare to the next station beyond.² Yet if the agents of the road direct him to a wrong train, though the conductor will be justified in following the ticket,³ the road will be liable, on the ground of this misdirection, if it carries him beyond his destination.⁴ Sometimes passengers, by consent of the road, are carried on its freight trains; as to which, no special explanations are necessary.⁵

§ 1082. **Stopping over.** — One owing another anything is entitled, if he chooses, to pay all at once; he cannot be required to discharge the obligation in parcels.⁶ On which principle, a railroad that has sold a ticket to a station named, silent as to stopping over, cannot be compelled to carry the passenger otherwise than on one continuous train.⁷ And if, without permission, the passenger leaves the train short of his destination, he cannot resume the journey on another, relying upon his ticket.⁸ Still, if he attempts it, the conductor cannot both refuse him and take up his ticket; and, if he offers to pay his passage on retaining his ticket, yet the conductor takes and

¹ *Plott v. Chicago, &c. Ry.* 63 Wis. 511.

² *Trotlinger v. East Tennessee, &c. Rld.* 11 Lea, 533; *Logan v. Hannibal, &c. Rld.* 77 Mo. 663.

³ Ante, § 1078, 1079.

⁴ *Marshall v. St. Louis, &c. Ry.* 78 Mo. 610. And see *Ohio, &c. Ry. v. Applewhite*, supra; *Pittsburgh, &c. Ry. v. Nuzum*, 50 Ind. 141; *South and North Alabama Rld. v. Huffman*, 76 Ala. 492; *International, &c. Ry. v. Hassell*, 62 Texas, 256.

⁵ *St. Louis, &c. Ry. v. Rosenberry*, 45 Ark. 256; *Arnold v. Illinois Cent. Rld.* 83 Ill. 273; *Cleveland, &c. Rld. v. Curran*, 19 Ohio State, 1; *South and North Alabama Rld. v. Huffman*, su-

pra; *Dunlap v. Northern Pac. Rld.* 35 Minn. 203; *Waterbury v. New York Cent. &c. Rld.* 17 Fed. Rep. 671; *Perkins v. Chicago, &c. Rld.* 60 Missis. 726; *Eaton v. Delaware, &c. Rld.* 57 N. Y. 382.

⁶ *Bishop Con.* § 1194.

⁷ *Churchill v. Chicago, &c. Rld.* 67 Ill. 390; *Oil Creek, &c. Ry. v. Clark*, 22 Smith, Pa. 231; *Wyman v. Northern Pac. Rld.* 34 Minn. 210; *Denny v. New York Cent. &c. Rld.* 5 Daly, 50.

⁸ *Drew v. Central Pac. Rld.* 51 Cal. 425; *Roberts v. Koehler*, 30 Fed. Rep. 94; *Hatten v. Railroad*, 39 Ohio State, 375; *The State v. Overton*, 4 Zab. 435; *Cleveland, &c. Rld. v. Bartram*, 11 Ohio State, 457.

declines to surrender it, then ejects him for non-payment, the road will be in default.¹ If the road has, as it may, a rule permitting a stopping over on conditions which it defines, — such as procuring from the conductor a stop-over ticket,² or the conductor's indorsement upon his ticket,³ — he is not therefore entitled to renew his travel after stopping except by conforming to the precise terms of the condition. Nor can he compel a stopping at a station not on the time-table.⁴ *A fortiori*, —

§ 1083. **Limited Tickets.** — Since the passenger has no stop-over rights except by concession of the road, it may, by express words in its tickets, exclude stopping over, or limit it or the tickets to a specified time.⁵ And, because a conductor, in dealing with a passenger, is to follow the terms of the ticket, however repugnant they may be to the latter's rights as between passenger and road,⁶ he may expel one who has taken the first train after the purchase, if the ticket-time has expired, though the delay of the train was by the road's fault.⁷ The time will ordinarily be computed by the rule which reckons the day as beginning and ending at midnight, and excludes fractions of a day.⁸ Thus, a ticket issued on the sixth of a month, and limited to two days, is good until the midnight of the eighth.⁹ If the ticket-time expires on Sunday and on that day there is no train, another rule of interpretation¹⁰ will permit the passenger to take a Monday train.¹¹ Or, if it expires while the passenger is *en route* to his destination, he may commonly continue to the end, though this depends on the words of the ticket's limitation; as, if it must be "used" within the time limited, it is used when accepted by

¹ Vankirk v. Pennsylvania Rld. 26 Smith, Pa. 66.

² Yorton v. Milwaukee, &c. Ry. 54 Wis. 234.

³ Denny v. New York Cent. &c. Rld. supra.

⁴ Dietrich v. Pennsylvania Rld. 21 Smith, Pa. 432.

⁵ Elmore v. Sands, 54 N. Y. 512; Boice v. Hudson River Rld. 61 Barb. 611; Gale v. Delaware, &c. Rld. 7 Hun, 670; Johnson v. Philadelphia, &c. Rld. 63 Md. 106; Hamilton v.

New York Cent. Rld. 51 N. Y. 100; Boston, &c. Rld. v. Proctor, 1 Allen, 267.

⁶ Ante, § 1078, 1079.

⁷ Pennsylvania Co. v. Hine, 41 Ohio State, 276.

⁸ Bishop Con. § 1340.

⁹ Georgia So. Rld. v. Bigelow, 68 Ga. 219.

¹⁰ Bishop Con. § 1438.

¹¹ Little Rock, &c. Ry. v. Dean, 43 Ark. 529, 534.

the conductor at the beginning of the journey, and he is entitled to adhere to the train until the journey terminates.¹ And the same effect has been given to the words "not good for a passage after" the date specified.² Like doctrines apply to —

§ 1084. **Other Special Words.** — One holding a ticket which, by its terms, is "not transferable," cannot, after riding on it part way, sell it to another with authority to finish the journey, though on the same train.³ A return-ticket, conditioned that the holder shall be identified in a particular way,⁴ — a coupon ticket, conditioned that a coupon shall be void if detached otherwise than by or in the presence of the conductor,⁵ — a commutation or other ticket limited by any lawful condition,⁶ can be made effectual only by using it as the condition states. Yet a statute, making tickets good for a term which it specifies, notwithstanding the road's conditions, is valid.⁷

IV. *The Act of Travel and its Rights and Obligations.*

§ 1085. **Already,** — in a preceding chapter, we have seen how, in general, a railroad should be equipped and run.⁸ As passenger traffic involves great danger and special responsibilities,⁹ suitable preparations for it should be made. Thus, —

§ 1086. **Depot and Grounds.** — The depot and connected grounds, visited by coming and going passengers, should be fitted up with a careful regard to their comfort and safety. The approaches, the tracks around, the platforms and places

¹ Auerbach v. New York Cent. &c. Rld. 89 N. Y. 281, 284, 285 ; Evans v. St. Louis, &c. Ry. 11 Mo. Ap. 463, 469.

² Lundy v. Central Pac. Rld. 66 Cal. 191.

³ Cody v. Central Pac. Rld. 4 Saw. 114 ; Way v. Chicago, &c. Ry. 64 Iowa, 48 ; Walker v. Wabash, &c. Ry. 15 Mo. Ap. 333.

⁴ Moses v. East Tennessee, &c. Rld. 73 Ga. 356 ; Mosher v. St. Louis, &c. Ry. 23 Fed. Rep. 326, 19 Fed. Rep. 849, 17 Fed. Rep. 880.

⁵ Boston, &c. Rld. v. Chipman, 146

Mass. 107 ; Louisville, &c. Rld. v. Harris, 9 Lea, 180.

⁶ Pennington v. Philadelphia, &c. Rld. 62 Md. 95 ; Hill v. Syracuse, &c. Rld. 63 N. Y. 101 ; Lillis v. St. Louis, &c. Ry. 64 Mo. 464 ; Downs v. New York, &c. Rld. 36 Conn. 287 ; Sherman v. Chicago, &c. Ry. 40 Iowa, 45 ; Powell v. Pittsburg, &c. Rld. 25 Ohio State, 70.

⁷ Dryden v. Grand Trunk Ry. 60 Maine, 512.

⁸ Ante, § 1023-1033.

⁹ Ante, § 1064.

for entering and leaving the cars, the passages to the cars; every spot likely to be visited by passengers seeking the depot, waiting at it for trains, or departing; should be made safe and kept so, and at reasonable times should be lighted. And passengers not in fault, injured through a neglect of this duty, may have compensation.¹ In considering whether or not they are in fault, it may be taken into the account that they are justly entitled to presume this duty to have been discharged by the road; rendering the several places, as far as practicable, safe.²

§ 1087. **Ladies' Waiting Room.** — A special protection and care are due to female passengers. And a depot may properly have a separate waiting room for them, and a rule³ excluding from it gentlemen not accompanied by ladies.⁴ So also, —

§ 1088. **Ladies' Car.** — It is in like manner competent for a railroad company to set apart a special car for ladies, and gentlemen accompanying them, and by a rule exclude all others.⁵

§ 1089. **Direction to Passengers.** — The road owes to passengers the duty to point out to them the trains they should take,

¹ *Hulbert v. New York Cent. Rld.* 40 N. Y. 145; *Carpenter v. Boston, &c. Rld.* 97 N. Y. 494; *Delamatyr v. Milwaukee, &c. Ry.* 24 Wis. 578; *Gaynor v. Old Colony, &c. Ry.* 100 Mass. 208; *Welfare v. London, &c. Ry.* Law Rep. 4 Q. B. 693; *Seymour v. Chicago, &c. Ry.* 3 Bis. 43; *Turner v. Vicksburg, &c. Rld.* 37 La. An. 648; *Chicago, &c. Ry. v. Fillmore*, 57 Ill. 265; *Baltimore, &c. Rld. v. The State*, 63 Md. 135; *Montgomery, &c. Ry. v. Thompson*, 77 Ala. 448; *Blodgett v. Bartlett*, 50 Ga. 353; *Keating v. New York Cent. Rld.* 3 Lans. 469; *Shannon v. Boston, &c. Rld.* 78 Maine, 52; *Stafford v. Hannibal, &c. Rld.* 22 Mo. Ap. 333; *Keefe v. Boston, &c. Rld.* 142 Mass. 251; *Memphis, &c. Rld. v. Whitfield*, 44 Missis. 466; *Knaresborough v. Belcher, &c. Min. Co.* 3 Saw. 446; *Texas, &c. Ry. v. Orr*, 46 Ark. 182; *Buenemann v.*

St. Paul, &c. Ry. 32 Minn. 390; *Archer v. New York, &c. Rld.* 106 N. Y. 589; *Reynolds v. Texas, &c. Ry.* 37 La. An. 694; *Chicago, &c. Ry. v. Coss*, 73 Ill. 394; *Sonier v. Boston, &c. Rld.* 141 Mass. 10; *Haff v. Minneapolis, &c. Ry.* 14 Fed. Rep. 558; *Simkin v. London, &c. Ry.* 21 Q. B. D. 453.

² *Brassell v. New York Cent. &c. Rld.* 84 N. Y. 241; *Wheelock v. Boston, &c. Rld.* 105 Mass. 203, 208; *Baltimore, &c. Rld. v. The State*, 60 Md. 449; *Hulbert v. New York Cent. Rld.* 40 N. Y. 145.

³ *Ante*, § 1072.

⁴ *Toledo, &c. Ry. v. Williams*, 77 Ill. 354.

⁵ *Chicago, &c. Ry. v. Williams*, 55 Ill. 185; *Bass v. Chicago, &c. Ry.* 36 Wis. 450; *Peck v. New York Cent. &c. Rld.* 70 N. Y. 587.

to warn them of special dangers, and otherwise when needful to direct their movements. Misfeasance in this duty, resulting in damage, will be actionable.¹

§ 1090. **Preserving Order — Travelling Conveniences — Safety in Cars.** — It is both the right and the duty of the road to preserve order among its passengers; and to protect a passenger, as well from the insults and assaults of fellow passengers, as of others.² On long routes it must furnish suitable ingress and egress to and from refreshment stations.³ And things within the car must not be so placed or constructed as to fall upon or otherwise injure a passenger.⁴

§ 1091. **Seat — (Crowded Cars).** — We have seen to what extent the duty of the road to accept a passenger depends on its having room for him.⁵ But the selling of a ticket to him is an acceptance of him. And the ticket-contract is interpreted to be, that it will carry him in a suitable seat. If the conductor cannot or will not furnish him a seat, the contract is broken; he need not give up his ticket, he may leave the car at the first opportunity, and sue the company for the breach of contract. But he cannot accept the transportation and refuse to pay for it. If he remains in the car, he must either surrender his ticket or pay in some other form; while yet, looking at the question in the light of the reason of the law rather than of authority, he retains against the road his action for withholding the agreed-for seat.⁶ The lack of a seat does not justify him in exposing himself to needless danger, and then asking the road to compensate him for an injury which

¹ Ante, § 1081; Union Ry. &c. Co. v. Shacklett, 19 Bradw. 145; Allender v. Chicago, &c. Ry. 43 Iowa, 476; Gonzales v. New York, &c. Rld. 39 How. Pr. 407; Pittsburgh, &c. Ry. v. Martin, 82 Ind. 476; Henry v. St. Louis, &c. Ry. 76 Mo. 288; Hannibal, &c. Rld. v. Martin, 11 Bradw. 386; McKimble v. Boston, &c. Rld. 139 Mass. 542.

² Ante, § 1068; New Orleans, &c. Rld. v. Burke, 53 Missis. 200; Flannery v. Baltimore, &c. Rld. 4 Mackey, 111; Sherley v. Billings, 8 Bush, 147.

³ Peniston v. Chicago, &c. Rld. 34 La. An. 777.

⁴ White v. Boston, &c. Rld. 144 Mass. 404; Hospes v. Chicago, &c. Ry. 29 Fed. Rep. 763; Morris v. New York Cent. &c. Rld. 106 N. Y. 678; Kleimnshagen v. Chicago, &c. Ry. 65 Wis. 66.

⁵ Ante, § 1062.

⁶ Davis v. Kansas City, &c. Rld. 53 Mo. 317; St. Louis, &c. Ry. v. Leigh, 45 Ark. 368; Memphis, &c. Rld. v. Benson, 85 Tenn. 627; Barden v. Boston, &c. Rld. 121 Mass. 426.

follows.¹ And the conductor can, and if necessary should, assign to the passenger his place in the standing-room; especially, if there is such room within the car, he may direct him to leave the more exposed platform.² The passenger is not entitled to a seat in a particular car which is full, he must take it where there is room.³

§ 1092. **Passenger.** — A “passenger” may be said, in general terms, to be any person whom the carrier is, as carrier, transporting.⁴ The carrier’s servant, going on his master’s business, is not a passenger.⁵ But one riding on a free ticket may be such,⁶ yet probably not if he has the mere invitation — is a sort of companion — of the conductor.⁷ A person under an express or implied contract of carriage with the road is a passenger⁸ — within what limits of time? One riding on a railroad’s stage-coach to the depot, with intent to take its cars, is a passenger, though the ticket is not purchased.⁹ So also is a person while in the act of inquiring for a ticket and about to take a train, before either is accomplished.¹⁰ Still more clearly is one such who has bought his ticket and is at the usual point of departure, though he has not entered the cars.¹¹ But a trespasser is not a passenger; so that, if one gets on a railroad train after it has started, when by implication it has withdrawn its invitation to enter, he does not become a passenger until he has reached a place of safety and is presumably accepted.¹² By the better doctrine, the pas-

¹ *Quinn v. Illinois Cent. Rld.* 51 Ill. 495; *Camden, &c. Rld. v. Hoosey*, 3 Out. Pa. 492. *Minn.* 217. See *Higgins v. Cherokee Rld.* 73 Ga. 149.

² *Graville v. Manhattan Rld.* 105 N. Y. 525. ⁸ *Hanson v. Mansfield Ry. &c. Co.* 38 La. An. 111 (compared with ante, § 619); *Dunn v. Grand Trunk Ry.* 58

³ *Pittsburgh, &c. Rld. v. Van Houten*, 48 Ind. 90. *Maine*, 187; *Indianapolis, &c. Ry. v. Beaver*, 41 Ind. 493; *Chicago, &c. Rld.*

⁴ *International, &c. Ry. v. Irvine*, 64 Texas, 529. And see post, § 1137. *v. Michie*, 83 Ill. 427.

⁵ *Union Pac. Ry. v. Nichols*, 8 Kan. 505, 517; *Texas, &c. Ry. v. Scott*, 64 Texas, 549; *Commonwealth v. Vermont, &c. Rld.* 108 Mass. 7. ⁹ *Buffett v. Troy, &c. Rld.* 40 N. Y. 168. And see *Cleveland v. New Jersey Steamb.* 68 N. Y. 306.

⁶ *Prince v. International, &c. Ry.* 64 Texas, 144. See *Ulrich v. New York Cent. &c. Rld.* 108 N. Y. 80. ¹⁰ *Allender v. Chicago, &c. Ry.* 37 Iowa, 264.

⁷ *Gradin v. St. Paul, &c. Ry.* 30 Minn. 238. ¹¹ *Central Rld. &c. Co. v. Perry*, 58 Ga. 461.

¹² *Merrill v. Eastern Rld.* 139 Mass. 238.

senger ceases to be such when, and not before, he is safely set down at his place of destination;¹ yet, whenever he voluntarily and without the fault of the road abandons the cars, his status of passenger ends.² Now, —

§ 1093. **Further as to which.** — While, for the interpretation of an occasional statute,³ it may be necessary to define the term “passenger,” the common-law responsibilities of the carrier have no relation thereto; they depend, not on the meaning of a word, but on fundamental principles of law. Some of the cases contain *dicta* in seeming contradiction to this proposition, yet the adjudged law and its reasons present nothing really adverse. Thus, —

§ 1094. **Carrier's Liability.** — It has already been explained that the road is under no duty of carefulness to one trespassing on its cars, but it must not injure him purposely or by a negligence so gross as to be equivalent to a purpose.⁴ This doctrine extends also to persons who have obtained a nominal permission through fraud.⁵ But the road owes carefulness to any person rightfully on any of its possessions, whether, like a train, moving, or, like its depot and tracks, at rest.⁶ So that, as to the one class care is required, as to the other it is not. And the rule for care, stated in a preceding section,⁷ does not vary with the name by which the person in danger is called, but with the magnitude of the interest, the liability to a miscarriage, and the gravity of a disaster. Plainly less of care is due to a person rightfully in the waiting-room at its depot than to one rightfully on a train rapidly running upon a curve just after a track-wrecking storm. And, in reason, it

¹ *Central Rld. v. Whitehead*, 74 Ga. 441; *McKimble v. Boston, &c. Rld.* 139 Mass. 542; *Allerton v. Boston, &c. Rld.* 146 Mass. 241.

² *Bishop Stat. Crimes*, § 470; *Commonwealth v. Boston, &c. Rld.* 129 Mass. 500.

³ As, see *Bishop Stat. Crimes*, § 467-470.

⁴ Ante, § 845, 846, 927, 1036, 1051; post, § 1118; *Chicago, &c. Rld. v. Michie*, 83 Ill. 427; *Gardner v. New Haven, &c. Co.* 51 Conn. 143.

⁵ *Toledo, &c. Ry. v. Beggs*, 85 Ill. 80; *Toledo, &c. Ry. v. Brooks*, 81 Ill. 245; *Gardner v. New Haven, &c. Co.* 51 Conn. 143; *Way v. Chicago, &c. Ry.* 64 Iowa, 48.

⁶ Ante, § 848, 853, 854, 876, 927, 1040, 1092; *Gradin v. St. Paul, &c. Ry.* 30 Minn. 217; *Illinois Cent. Rld. v. Phillips*, 55 Ill. 194; *Austin v. Great Western Ry.* Law Rep. 2 Q. B. 442; *Philadelphia, &c. Rld. v. Derby*, 14 How. U. S. 468.

⁷ Ante, § 1064.

will be of little consequence whether he is technically a passenger or not.

§ 1095. **Fares — Rights depending on.** — In collecting fares or tickets, the conductor necessarily concedes or rejects the right of each person to the ride he claims. If he decides incorrectly against one, or if afterward he assumes contrary to the fact that a fare has not been paid, and the passenger suffers in any way therefrom, the road will be answerable in damages.¹ And it is the same if he assaults one to make him pay.² Though passengers may not needlessly detain him, and a conspiracy among them to do it compelling him to stop the cars or let them off without taking their tickets would unquestionably be an actionable wrong³ and even indictable, he should be considerate of the exceptional misfortunes of those who, from any cause, even from drunkenness,⁴ and especially from age and infirmity,⁵ are unable instantly to produce their tickets or the money.⁶ Where a man boarded a train to ride four miles, and the conductor asking for his fare refused to let him go to the rear car and get it from one who had promised to pay it, then summarily ejected him, the majority of a divided court compelled the road to compensate him.⁷ Ordinarily, not speaking of exceptions which may arise from special facts, if the passenger's ticket is to a station at which the train does not stop, he is entitled, should he choose,

¹ Ante, § 1078 ; Philadelphia, &c. Rld. v. Rice, 64 Md. 63 ; Jeffersonville Rld. v. Rogers, 38 Ind. 116 ; Gibson v. East Tennessee, &c. Rld. 30 Fed. Rep. 904 ; Quigley v. Central Pac. Rld. 11 Nev. 350 ; Moore v. Fitchburg Rld. 4 Gray, 465 ; Chicago, &c. Ry. v. Chisholm, 79 Ill. 584.

² Ramsden v. Boston, &c. Rld. 104 Mass. 117.

³ Ante, § 355-359.

⁴ Louisville, &c. Rld. v. Sullivan, 81 Ky. 624 ; Gill v. Rochester, &c. Rld. 37 Hun, 107.

⁵ Louisville, &c. Rld. v. Fleming, 14 Lea, 128.

⁶ Maples v. New York, &c. Rld. 38 Conn. 557.

⁷ Clark v. Wilmington, &c. Rld. 91 N. C. 506, Smith, C. J. among other things observing : " Where there has been no refusal to pay the fare, and the obligation not disputed, but for some reason, such as the mislaying of the ticket, or loss of pocketbook in which the money is kept, or other adequate cause which prevents a prompt response to the conductor's demand, it is but reasonable that an opportunity should be allowed the passenger to search for what is mislaid or lost, or to provide other means of payment, where the delay does not interfere with the regular duties of the officer in charge." p. 513.

to ride to the nearest intermediate station at which it does stop.¹ If he is on such a train of his own fault, he cannot complain though from the want of an intermediate stopping-place he is taken to one beyond, and compelled to pay the additional fare.² If, through his own mistake, he is on a train which he did not intend to take, he cannot on the one hand be treated as a trespasser, or on the other hand claim to be put off short of its first stopping-place, and he must pay for his ride.³

§ 1096. **Ticket Lost or Mislaid.**—It is a familiar proposition, both of law and of reason, that one who has lost a writing which embodies a contract does not thereby forfeit his rights under it, if he can prove its contents.⁴ It is also, in law and in reason, plain that it is competent for a railroad corporation to establish a rule⁵ requiring passengers to exhibit their tickets to the conductor, or to issue tickets conditioned to be effectual only on being so exhibited.⁶ If, then, one owning a ticket subject to such rule or condition goes upon a train relying on it, and is unable to produce it when called for by the conductor, and unwilling to pay his fare as though it did not exist, can he be treated as a trespasser and ejected? In an English case, one holding a ticket subject to a by-law of the road that "every passenger shall show and deliver up his ticket to any duly authorized servant of the company when required to do so for any purpose, and any passenger travelling without a ticket or failing or refusing to show or deliver up his ticket as aforesaid shall be required to pay the fare from the station whence the train originally started to the end of his journey," lost the ticket, entered a train, gave his name and address with the other facts to the conductor, and declined to pay a second fare. He was ejected

¹ *Richmond, &c. Rld. v. Ashby*, 79 Va. 130. And see ante, § 1078; *Stewart v. Boston, &c. Rld.* 146 Mass. 605.

² *Trotlinger v. East Tennessee, &c. Rld.* 11 Lea, 533.

³ *Columbus, &c. Ry. v. Powell*, 40 Ind. 37. And see *Brown v. Hannibal, &c. Rld.* 66 Mo. 588.

⁴ 1 Greenl. Ev. § 558.

⁵ Ante, § 1072.

⁶ *Townsend v. New York Cent. &c. Rld.* 56 N. Y. 295; *Shelton v. Lake Shore, &c. Ry.* 29 Ohio State, 214. Compare these and other American cases with *Saunders v. Southeastern Ry.* 5 Q. B. D. 456.

from the car, and the court held him entitled to damages from the road. In failing to show the ticket he had broken his contract, but the contract did not provide that the breach should subject him to expulsion, or make him a trespasser.¹ In a Connecticut case, one held a commutation ticket conditioned that he should show it to the conductor when requested. During one ride, he was unable to find it when asked. The conductor knew him to be a commuter; but, under instructions from the road, ejected him. He was held entitled to damages. There were some circumstances of aggravation, perhaps entering somewhat into the decision.² Still it is, at least, the better American doctrine that, under rules and conditions sufficiently direct and explicit, a passenger forfeits his ride, and subjects himself to be treated as a trespasser, if, having lost or mislaid his ticket, and being given all reasonable opportunity to search for it, he is unable to produce it, and declines to pay fare to the conductor.³ We have cases which go to the unjustifiable length that, if one conductor takes up the ticket, then, the conductors being changed, the next one ejects the passenger for having no ticket, there is a trespass by the passenger and none by the road; it being deemed that he should pay his fare over again and sue the road for non-compliance with its contract of carriage.⁴ These cases ignore the familiar proposition that what one does by his agent he does by himself. Whether the road employs one conductor or fifty, a ticket exhibited to any one and taken up by him is exhibited to and taken up by the road; if, thereupon, the road by its fiftieth conductor treats the passenger as a trespasser and ejects him, the legal consequence is the same as though the act had been performed through the first conductor. When the road took up the ticket, it waived the

¹ *Butler v. Manchester, &c. Ry.* 21 Q. B. D. 207.

² *Maples v. New York, &c. Rld.* 38 Conn. 557.

³ *Ripley v. New Jersey Rld. &c. Co.* 2 Vroom, 388; *Crawford v. Cincinnati, &c. Rld.* 26 Ohio State, 580; *Jerome v. Smith*, 48 Vt. 230; *The State v. Dela-*

ware, &c. Rld. 19 Vroom, 55; *International, &c. Rld. v. Wilkes*, 68 Texas, 617.

⁴ *Townsend v. New York Cent. &c. Rld. and Shelton v. Lake Shore, &c. Ry.* supra. Contra, ante, § 1078; *Pittsburg, &c. Ry. v. Hennigh*, 39 Ind. 509; *Palmer v. Charlotte, &c. Rld.* 3 S. C. 580; *Jerome v. Smith*, supra, at p. 235.

condition of exhibiting it for the future; it had the ticket, and it was not the passenger's fault if it did not look at it every successive second afterward.

§ 1097. **Expulsion from Car.**—Whenever, within the elucidations of the last two sections, it appears that a person claiming a passage is a trespasser on the cars, — as, where he refuses to present a ticket or to pay, — or it appears in any other way, the road through its conductor¹ has the same right to put him off which is exercised by any other owner of property in ejecting a trespasser.² And the right is subject to the like limitations and conditions. For inflicting on him a mere wanton injury;³ as, by putting him off with unnecessary violence,⁴ or at an unfit place,⁵ or while the car is in motion;⁶ under the statutes of some of the States, by putting him off anywhere but at a regular station,⁷ though in the absence of a statute there may be other places which will be deemed fit;⁸ the road will be liable to him in damages. After declining to pay fare he may change his mind and pay,⁹ but not generally after the train has been stopped for the sole purpose of ejecting him.¹⁰ The principle, not quite distinctly developed in the

¹ *Terre Haute, &c. Rld. v. Fitzgerald*, 47 Ind. 79; *Columbus, &c. Ry. v. Powell*, 40 Ind. 37.

² Ante, § 824, 825, 846, 1051; *Toledo, &c. Rld. v. Patterson*, 63 Ill. 304; *Chicago, &c. Ry. v. Herring*, 57 Ill. 59; *Law v. Illinois Cent. Rld.* 32 Iowa, 534; *Belknap v. Boston, &c. Rld.* 49 N. H. 358.

³ *Illinois Cent. Rld. v. Whittemore*, 43 Ill. 420, 423; *Chicago, &c. Ry. v. Williams*, 55 Ill. 185.

⁴ *New York, &c. Ry. v. Haring*, 18 Vroom, 137; *Bland v. Southern Pac. Rld.* 65 Cal. 626; *Great Western Ry. v. Miller*, 19 Mich. 305; *Kline v. Central Pac. Rld.* 37 Cal. 400; *Western, &c. Rld. v. Turner*, 72 Ga. 292; *Hinckley v. Chicago, &c. Ry.* 38 Wis. 194; *Peck v. New York Cent. &c. Rld.* 70 N. Y. 587; *Coleman v. New York, &c. Rld.* 106 Mass. 160; *Chicago, &c. Rld. v. Bills*, 104 Ind. 13; *Louisville, &c. Rld.*

v. Whitman, 79 Ala. 328; *Brown v. Hannibal, &c. Rld.* 66 Mo. 588.

⁶ *Louisville, &c. Rld. v. Sullivan*, 81 Ky. 624; *Houston, &c. Ry. v. Devainy*, 63 Texas, 172.

⁶ *Law v. Illinois Cent. Rld.* 32 Iowa, 534; *Kline v. Central Pac. Rld.* 39 Cal. 587; *The State v. Kinney*, 34 Minn. 311.

⁷ *St. Louis, &c. Ry. v. Branch*, 45 Ark. 524; *Chicago, &c. Ry. v. Peacock*, 48 Ill. 253; *Illinois Cent. Rld. v. Johnson*, 67 Ill. 312; *Illinois Cent. Rld. v. Sutton*, 53 Ill. 397.

⁸ *Everett v. Chicago, &c. Ry.* 69 Iowa, 15; *Wyman v. Northern Pac. Rld.* 34 Minn. 210.

⁹ *Gould v. Chicago, &c. Ry.* 5 McCrary, 502, 18 Fed. Rep. 155; *O'Brien v. New York Cent. &c. Rld.* 80 N. Y. 236; *South Carolina Rld. v. Nix*, 68 Ga. 572.

¹⁰ *O'Brien v. New York Cent. &c.*

cases, appears to be, that, after the road has done something with reference to the expulsion, in distinction from a mere stopping where it would stop as of course, thereby subjecting it to a loss, the offer of the fare comes too late; not before. One responsible for the fare of a child riding with him may be ejected for not paying it, though he pays his own.¹ A passenger whom the conductor attempts to expel wrongfully may resist;² and, whether he does or not, the road will be answerable for the assault.³

§ 1098. **Injuries through Negligence.** — The rules which subject to liability a person through whose negligence another suffers injury, specially explained in one chapter⁴ and further elucidated in various subsequent chapters, apply to the relation of railroad carrier and passenger. And the books are crowded with illustrative cases. It is not necessary to repeat here the rules, or to set down the numerous and complicated facts to which, under the present head, they have been applied. Yet something more brief may be given. Thus, —

§ 1099. **Taking on Passengers.** — The road, having its station and surrounding grounds in a condition of safety,⁵ placing now its cars in their proper position, giving all due signals⁶ and other warnings,⁷ is in a situation to receive passengers without responsibility for injuries which may befall them. It is ordinarily the passenger's duty to take the train at this place and before it starts.⁸ Still it is not necessarily and under all circumstances contributory negligence to board a train at another place, or in motion. The occasion for it, the manner of doing it, the rapidity of the motion of the train, all

Rld. *supra*; Hibbard v. New York, &c. Rld. 15 N. Y. 455; Cincinnati, &c. Rld. v. Skillman, 39 Ohio State, 444. And see Pease v. Delaware, &c. Rld. 101 N. Y. 367. Contra, as to the case where the refusal was not wilful. Texas, &c. Ry. v. Bond, 62 Texas, 442.

¹ Philadelphia, &c. Rld. v. Hoeflich, 62 Md. 300.

² English v. Delaware, &c. Canal, 66 N. Y. 454.

³ Ante, § 1095; Indianapolis, &c. Rld. v. Milligan, 50 Ind. 392.

⁴ Ante, § 433-484.

⁵ Ante, § 1086; Mayo v. Boston, &c. Rld. 104 Mass. 137.

⁶ Chaffee v. Boston, &c. Rld. 104 Mass. 108.

⁷ Ante, § 1081, 1089.

⁸ Central Rld. &c. Co. v. Perry, 58 Ga. 461; Stoner v. Pennsylvania Co. 98 Ind. 384; Paulitsch v. New York Cent. &c. Rld. 102 N. Y. 280; Player v. Burlington, &c. Ry. 62 Iowa, 723; McCorkle v. Chicago, &c. Ry. 61 Iowa, 555.

may differ; so commonly the question is for the jury.¹ But to attempt to jump upon a train running with any considerable rapidity is so obviously negligence that the court can pronounce it to be such as of law.²

§ 1100. **Discharging Passengers.** — It is the duty of the road to have at each station a safe platform and surroundings for the discharge of passengers,³ and to stop at the platform, call out the station, and remain there a reasonable time for those to alight who wish.⁴ If, through a neglect of this duty, one is carried beyond his destination, he may have damages of the road.⁵ Every passenger is entitled and required to assume in advance that this duty will be done;⁶ and one who leaps from a rapidly moving train, under the belief that it will not stop, will be without remedy if he is injured.⁷ If a passenger is sick, and unable to leave the car with the usual celerity, the conductor should be notified, then he should furnish due opportunity.⁸ Hereupon, —

§ 1101. **Complicated Facts.** — The facts of cases present endless complications. Sometimes a conductor, instead of stopping as he ought, slackens speed and tells the passenger to jump. In this and similar cases, it being within the conductor's functions to superintend the getting off of passengers, it is commonly the road's fault and the passenger may have his damages, if, following the direction, he is injured.⁹ Some-

¹ *Ib.*; *Swigert v. Hannibal, &c. Rld.* 75 Mo. 475; *Solomon v. Manhattan Ry.* 103 N. Y. 437; *Wabash, &c. Ry. v. Rector*, 104 Ill. 296.

² *Knight v. Pontchartrain Rld.* 23 La. An. 462; *Hubener v. New Orleans, &c. Rld.* 23 La. An. 492; *Denver, &c. Rld. v. Pickard*, 8 Colo. 163; *Phillips v. Rensselaer, &c. Rld.* 49 N. Y. 177; *Keating v. New York Cent. &c. Rld.* 49 N. Y. 673.

³ *Ante*, § 1086; *Memphis, &c. Rld. v. Whitfield*, 44 Missis. 466; *Terre Haute, &c. Rld. v. Buck*, 96 Ind. 346.

⁴ *Louisville, &c. Rld. v. Mask*, 64 Missis. 738; *Dickens v. New York Cent. Rld.* 1 Abb. Ap. 504; *Jeffersonville, &c. Rld. v. Parmalee*, 51 Ind. 42;

Loyd v. Hannibal, &c. Rld. 53 Mo. 509.

⁵ *Illinois Cent. Rld. v. Able*, 59 Ill. 131; *Hobbs v. London, &c. Ry.* Law Rep. 10 Q. B. 111; *East Tennessee, &c. Rld. v. Lockhart*, 79 Ala. 315; *Illinois Cent. Rld. v. Chambers*, 71 Ill. 519; *Mobile, &c. Rld. v. McArthur*, 43 Missis. 180.

⁶ *Ante*, § 1086.

⁷ *Illinois Cent. Rld. v. Chambers*, *supra*; *East Tennessee, &c. Rld. v. Massengill*, 15 Lea, 328; *Ohio, &c. Ry. v. Stratton*, 78 Ill. 88. And see *Gavett v. Manchester, &c. Rld.* 16 Gray, 501.

⁸ *New Orleans, &c. Rld. v. Statham*, 42 Missis. 607.

⁹ *Ante*, § 618, 619; *Bucher v. New*

times a train does not stop, as it should, or its stay is too short; thereupon, if a passenger to avoid being carried beyond his destination gets off from the moving cars and is injured, this is not under all circumstances contributory negligence in him. To be such, the facts must be of a sort rendering the act reckless, — a question for the jury.¹ Yet generally, if the passenger in the face of obvious danger gets off, instead of submitting to be carried to the next station and seeking redress from the road, he takes upon himself the whole responsibility for the consequences.² Sometimes the conductor stops the train at an improper place, before or after reaching the platform, and requires the passengers to alight. Within a principle previously stated, they are justified in assuming the place to be safe,³ and only in exceptional circumstances will their alighting be contributory negligence.⁴ If, after the train has stopped a reasonable time, the conductor, supposing all to have got off, starts it, injuring a passenger in the act of alighting, the road is not responsible;⁵ but it is responsible if he has cause to believe that the passenger, though dilatory, is in the act of getting off.⁶ There are various other forms of the road's negligence,⁷ and of the passenger's contributory negli-

York Cent. &c. Rld. 98 N. Y. 128; Baltimore, &c. Rld. v. Leapley, 65 Md. 571; Filer v. New York Cent. Rld. 59 N. Y. 351; St. Louis, &c. Rld. v. Cantrell, 37 Ark. 519; Georgia Rld. &c. Co. v. McCurdy, 45 Ga. 288. And see and compare Lindsey v. Chicago, &c. Ry. 64 Iowa, 407; Bardwell v. Mobile, &c. Rld. 63 Missis. 574; Burrows v. Erie Ry. 3 Thomp. & C. 44; South and North Alabama Rld. v. Schaufier, 75 Ala. 136.

¹ Filer v. New York Cent. Rld. 49 N. Y. 47; Little Rock, &c. Ry. v. Atkins, 46 Ark. 423; Leslie v. Wabash, &c. Ry. 88 Mo. 50; Taylor v. Missouri Pac. Ry. 26 Mo. Ap. 336; Loyd v. Hannibal, &c. Rld. 53 Mo. 509; Nichols v. Dubuque, &c. Ry. 68 Iowa, 732.

² Burrows v. Erie Ry. 63 N. Y. 556; Jewell v. Chicago, &c. Ry. 54 Wis. 610; Illinois Cent. Rld. v. Green, 81 Ill. 19;

Lake Shore, &c. Ry. v. Bangs, 47 Mich. 470; Illinois Cent. Rld. v. Able, 59 Ill. 131; Morrison v. Erie Ry. 56 N. Y. 302; Illinois Cent. Rld. v. Lutz, 84 Ill. 598.

³ Ante, § 1086, 1100.

⁴ Memphis, &c. Rld. v. Whitfield, 44 Missis. 466; Memphis, &c. Ry. v. Stringfellow, 44 Ark. 322; Central Rld. v. Van Horn, 9 Vroom, 133; Terre Haute, &c. Rld. v. Buck, 96 Ind. 346; Columbus, &c. Ry. v. Farrell, 31 Ind. 408; Winkler v. St. Louis, &c. Ry. 21 Mo. Ap. 99; Lewis v. Flint, &c. Ry. 54 Mich. 55.

⁵ Illinois Cent. Rld. v. Slatton, 54 Ill. 133; Clotworthy v. Hannibal, &c. Rld. 80 Mo. 220.

⁶ Straus v. Kansas City, &c. Rld. 86 Mo. 421.

⁷ Sauter v. New York Cent. &c. Rld. 66 N. Y. 50; Andrist v. Union Pac.

gence,¹ in connection with leaving a train and the road; but they involve no principles not already made familiar in this volume.

§ 1102. **Negligent Carriage**,—to the injury of a passenger, is likewise within principles brought to view in other connections in this volume. Thus,—

§ 1103. **Inevitable Accident**.—For injury to a passenger through inevitable accident, where there is no want of care in the road, it is not liable to him.² An illustration is the falling of a bridge or the washing away of the track, after a duly careful construction and keeping in repair, produced by a cloud-burst or violent storm.³ But in a case of this nature, if the road's fault was an element in the injury, it will be responsible.⁴ A broken rail is a further illustration: if its weak condition was in any degree a product of the negligence of the road, a non-negligent passenger injured by the breaking may enforce compensation, but not if the defect was latent and not discoverable by inspection and the due application of tests.⁵ And for the falling of a bridge undergoing repairs the road will be answerable or not to a passenger injured, according to the circumstances as illumined by these principles.⁶

§ 1104. **Track and Cars**.—Any other negligence in or about the track and cars, resulting in injury to a non-negligent passenger, will charge the road.⁷ On the same principle,—

Ry. 30 Fed. Rep. 345; *McClelland v. Louisville, &c. Ry.* 94 Ind. 276; *Hemingway v. Chicago, &c. Ry.* 67 Wis. 668; *Milliman v. New York Cent. &c. Rld.* 66 N. Y. 642.

¹ *Eckerd v. Chicago, &c. Ry.* 70 Iowa, 353; *Straus v. Kansas City, &c. Rld.* 75 Mo. 185; *McKimble v. Boston, &c. Rld.* 141 Mass. 463; *Lenix v. Missouri Pac. Ry.* 76 Mo. 86; *Nance v. Carolina Cent. Rld.* 94 N. C. 619; *Van Ostran v. New York Cent. &c. Rld.* 35 Hun, 590; *McQuilken v. Central Pac. Rld.* 64 Cal. 463; *Forsyth v. Boston, &c. Rld.* 103 Mass. 510; *Potter v. Wilmington, &c. Rld.* 92 N. C. 541; *Cartwright v. Chicago, &c. Ry.* 52 Mich. 606.

² Ante, § 155–185; *Kentucky Cent. Rld. v. Thomas*, 79 Ky. 160.

³ Ante, § 170, 841, 965, 1024.

⁴ *Philadelphia, &c. Rld. v. Anderson*, 13 Norris, Pa. 351.

⁵ Ante, § 645, 964; *Anthony v. Louisville, &c. Rld.* 27 Fed. Rep. 724; *Kentucky Cent. Rld. v. Thomas*, supra; *Brignoli v. Chicago, &c. Ry.* 4 Daly, 182; *Heazle v. Indianapolis, &c. Ry.* 76 Ill. 501.

⁶ *Louisville, &c. Ry. v. Pedigo*, 108 Ind. 481.

⁷ Ante, § 1024; *West Chester, &c. Rld. v. McElwee*, 17 Smith, Pa. 311; *Chicago, &c. Rld. v. McAra*, 52 Ill. 296; *Reed v. New York Cent. Rld.* 56 Barb. 493; *Toledo, &c. Ry. v. Apper-*

§ 1105. **Running.**—Negligence in running the cars, whereby a passenger is injured, will bring the road under liability to him.¹

§ 1106. **Position in Car.**²—Whether or not it is contributory negligence in a passenger to occupy an exposed position in a car, or a car not meant for passengers, will depend on all the facts of the particular case. It is the duty of a conductor, knowing better than a passenger what places are dangerous, to warn away one who is occupying a place of special danger. And, if a passenger, without the conductor's knowledge or consent, rides in a baggage, mail, or express car, he cannot recover damages of the road for injuries which would not have befallen him had he been in a passenger car.³ But if a road undertakes to transport stockmen on the top of its freight trains, it cannot object, when sued for injuries to them, that they were occupying a place of danger; it should itself use special care.⁴ The platform of a car is a dangerous place; yet not to the extent of making it, in all circumstances, contributory negligence in law to be riding upon it.⁵ If a rule of the road whereof the passenger has knowledge⁶ forbids him to be there, or if he is warned off by the conductor, he will be barred of his action for injuries inflicted by the road's negligence.⁷ But when a car is full and there are no seats left, the conductor cannot do otherwise than authorize the passengers to stand in positions less safe than the seats,—a permission implied from the circumstances. And the road cannot

son, 49 Ill. 430; *Mobile, &c. Rld. v. Ashcraft*, 49 Ala. 305; *Jetter v. New York, &c. Rld.* 2 Abb. Ap. 458; *Eames v. Texas, &c. Ry.* 63 Texas, 660; *Louisville, &c. Rld. v. McKenna*, 7 Lea, 313.

¹ Ante, § 1025, 1026; *Tyrrell v. Eastern Rld.* 111 Mass. 546; *Rockford, &c. Rld. v. Coultas*, 67 Ill. 398; *Montgomery, &c. Rld. v. Boring*, 51 Ga. 582; *Vicksburg, &c. Rld. v. Howe*, 52 Missis. 202; *Kellow v. Central Iowa Ry.* 68 Iowa, 470; *Farlow v. Kelly*, 108 U. S. 288.

² As to street car, see post, § 1119.

³ *Kentucky Cent. Rld. v. Thomas*,

79 Ky. 160. And see *Doggett v. Illinois Cent. Rld.* 34 Iowa, 284; *O'Donnell v. Allegheny Valley Rld.* 9 Smith, Pa. 239; *Houston, &c. Rld. v. Clemmons*, 55 Texas, 88.

⁴ *Tibby v. Missouri Pac. Ry.* 82 Mo. 292.

⁵ *Gerstle v. Union Pac. Ry.* 23 Mo. Ap. 361; *Werle v. Long Island Rld.* 98 N. Y. 650. And see *Atchison, &c. Rld. v. McCandliss*, 33 Kan. 366.

⁶ Ante, § 1072.

⁷ *Memphis, &c. Ry. v. Salinger*, 46 Ark. 528; *Alabama Great So. Rld. v. Hawk*, 72 Ala. 112.

claim that in occupying such places they are contributorily negligent.¹ This question oftener arises in street-car travel, where the temptation to overcrowd is greater.² In other ways, not necessary to be here specified, the passenger may become contributorily negligent by the position he assumes in riding.³ As to one further particular, —

§ 1107. **Elbow out at Window.** — In reason, it does not seem promotive of care in a railroad to encourage obstructions along the track within a fraction of an inch from the windows of passing cars. Still the courts have been quite severe upon adult sane persons who have projected an elbow, however slightly, out of a window to their injury; commonly holding such act to be contributory negligence.⁴ But there are cases which reject or more or less modify this strict rule.⁵ The United States Supreme Court has held, that one is not contributorily negligent who rides with his elbow on the sill of an open window, not protruding it beyond the car.⁶

§ 1108. **Sudden Danger.** — One confronted by a sudden danger, and compelled to act instantaneously, will not be contributorily negligent if he fails to make the wisest choice. This is specially so, as between road and passenger, where the danger proceeds from the road's fault.⁷ And one jumping from a car, to avoid the consequences of a plainly impending collision caused by the negligence of the road, may, if injured

¹ Werle v. Long Island Rld. supra; Md. 329; Louisville, &c. Rld. v. Sick-
Dickinson v. Port Huron, &c. Ry. 53
Mich. 43.

² Clark v. Eighth Avenue Rld. 32
Barb. 657; Lapointe v. Middlesex Rld.
144 Mass. 18; Ginna v. Second Avenue
Rld. 67 N. Y. 596; Andrews v. Capi-
tol, &c. Rld. 2 Mackey, 137; German-
town Pass. Ry. v. Walling, 1 Out. Pa.
55; Nolan v. Brooklyn City, &c. Rld.
87 N. Y. 63.

³ Wood v. Lake Shore, &c. Ry. 49
Mich. 370; Truex v. Erie Ry. 4 Lans.
198; Harris v. Hannibal, &c. Rld. 89
Mo. 233; Pool v. Chicago, &c. Ry. 53
Wis. 657; Norfolk, &c. Rld. v. Fergu-
son, 79 Va. 241.

⁴ Pittsburgh, &c. Rld. v. Andrews, 39

Md. 329; Louisville, &c. Rld. v. Sick-
ings, 5 Bush, 1; Dun v. Seaboard, &c.
Rld. 78 Va. 645.

⁵ See the expositions of Lacy, J. in
Dun v. Seaboard, &c. Rld. supra; Chi-
cago, &c. Rld. v. Pondrom, 51 Ill. 333;
Houston, &c. Ry. v. Hampton, 64
Texas, 427.

⁶ Farlow v. Kelly, 108 U. S. 288.

⁷ Ante, § 445; Coulter v. American,
&c. Express, 56 N. Y. 585; Stevenson
v. Chicago, &c. Rld. 18 Fed. Rep. 493;
Dutzi v. Geisel, 23 Mo. Ap. 676; Sal-
tonstall v. Stockton, Taney, 11, 21;
Mark v. St. Paul, &c. Ry. 30 Minn.
493; Pittsburgh, &c. Ry. v. Martin, 82
Ind. 476.

by the leap, have his damages.¹ But it is otherwise where, though the road is not absolutely free from blame, there was no just occasion for the fright, and the act was under the circumstances simply reckless.² For a passenger may well be held to the prudence ordinarily to be expected of a person of his age and condition, in the like emergency.

§ 1109. **Person accompanying Passenger.** — One who goes to the depot and train to see a friend off, or to welcome him on his return, is not a trespasser on the possessions of the road. Not always are his claims deemed as high as those of a passenger;³ but, at least, they equal those of any other sort of person lawfully on another's premises,⁴ and the road will be answerable to him for an injury suffered through its negligence, to which his own did not contribute.⁵ And one not on this business may be so otherwise lawfully there as to come substantially within this protection.⁶ A person escorting another on or off a car is entitled to the same warnings of a starting as the passenger.⁷

V. *Connecting Lines.*

§ 1110. **General.** — Where, as is common, tickets are sold by one company for passage over its own road and connecting lines of other companies, rights are created under the law of contract and of agency, the discussion whereof is not so clearly within the scope of this volume as to become desirable here.

¹ *Spicer v. Chicago, &c. Ry.* 29 Wis. 580.

² *Woolery v. Louisville, &c. Ry.* 107 Ind. 381; *Gulf, &c. Ry. v. Wallen*, 65 Texas, 568. See *Muldowney v. Illinois Cent. Ry.* 36 Iowa, 462.

³ Ante, § 1064, 1094.

⁴ Ante, § 848-854.

⁵ *Lucas v. New Bedford, &c. Rld.* 6 Gray, 64; *Hamilton v. Texas, &c. Ry.* 64 Texas, 251; *Smith v. Chicago, &c. Ry.* 55 Iowa, 33; *Atchison, &c. Rld. v. Johns*, 36 Kan. 769; *Texas, &c. Ry.*

v. Best, 66 Texas, 116; *McKone v. Michigan Cent. Rld.* 51 Mich. 601; *Griswold v. Chicago, &c. Ry.* 64 Wis. 652; *Stiles v. Atlanta, &c. Rld.* 65 Ga. 370; *Central Rld. &c. Co. v. Letcher*, 69 Ala. 106; *Houston, &c. Ry. v. Leslie*, 57 Texas, 83.

⁶ *Illinois Cent. Rld. v. Hammer*, 72 Ill. 347; *Gillis v. Pennsylvania Rld.* 9 Smith, Pa. 129; *Pittsburgh, &c. Ry. v. Bingham*, 29 Ohio State, 364.

⁷ *Doss v. Missouri, &c. Rld.* 59 Mo. 27.

VI. *Third Persons and Corporations Injuring Passengers.*

§ 1111. **When Liable.** — Under the universal doctrine of negligence,¹ an individual or corporation whose negligence brings harm to a non-negligent other person must compensate him. And it is not otherwise though there is a third person also liable for the same harm,² or though such third person is a common carrier having in custody the one injured.³

VII. *Sleeping and Palace Cars.*

§ 1112. **Baggage and Effects.** — The responsibilities of railroad and palace car companies for the baggage and personal effects of passengers will be considered in the chapter on "Baggage," further on.

§ 1113. **Safety.** — A railroad company cannot limit its liability for the safety of its passengers by varying the forms of its agencies, or the methods of paying for the service. So that, if it suffers a separate company to run in its trains palace and sleeping cars, with an independent service, to be compensated by such passengers as elect to use them, the road is still under the same obligation of care to a passenger in the other company's car as in its own; for example, if he is injured through a defect in such car, instead of a car belonging to the road.⁴

§ 1114. **Palace-car Company.** — In contemplation of law,⁵ the palace-car company and its servants are the servants of the road.⁶ And on the principle that one who aids another in committing a tort is himself responsible, equally with the other, to the person injured,⁷ so that commonly a servant is

¹ Ante, § 433-484.

² Ante, § 518-535.

³ Ante, § 1068-1071; *Berringer v. Great Eastern Ry.* 4 C. P. D. 163; *Patterson v. Wabash, &c. Ry.* 54 Mich. 91.

⁴ *Pennsylvania Co. v. Roy*, 102 U. S. 451. And see *Cleveland, &c. Rld. v. Walrath*, 38 Ohio State, 461; *Thorpe v. New York Cent. &c. Rld.* 76 N. Y. 402;

Louisville, &c. Rld. v. Katzenberger, 16 Lea, 380; *Ulrich v. New York Cent. &c. Rld.* 108 N. Y. 80. This principle has been also applied to a hotel keeper; who has a special arrangement with his ostler. *Day v. Bather*, 2 H. & C. 14, 9 Jur. N. s. 444.

⁵ Ante, § 600, 604, 607, 609.

⁶ Cases cited to the last section.

⁷ Ante, § 522-526.

holden when his master is,¹ the palace-car company is, in legal reason, answerable to the injured passenger jointly and severally with the road. On this sort of question, we have not probably much direct adjudication.²

§ 1115. *The Doctrine of this Chapter restated.*

A single half century has wrought a revolution bringing railroad travel to the front, and rendering it the most common and important of all travel. But it has wrought no corresponding revolution in the common law. The same system of legal reason which constituted the common law fifty, a hundred, or two hundred years ago, constitutes it to-day. Whatever be the revolutions in methods, and the progress of events, the common law—that is, the system of reason—is the same to-day as yesterday; and the just hope of mankind is, that it may be the same to-morrow and forever. As well might we long for a change in the One Maker and Preserver of all things as in the common law. Yet as we desire that man may grow in obedience to his Maker, whereby his acts will more and more accurately express the Higher Will, so also we trust that the adjudications of our courts will constantly improve in their necessarily somewhat imperfect conformity to the common law. Railroad carriage stands at the head of passenger carriage in its dangers; therefore, also, in the carefulness required of the carrier. The common carrier of passengers is a *quasi* public officer: he must exercise his office impartially, rejecting no applicant for a passage except for some good reason. And he must furnish the accommodations which he holds himself out as providing. He must preserve order in his vehicles; and he may eject a passenger who persists in making a disturbance³ or, after notice, violating any reasonable rule of the road;⁴ and he may confine or expel, as the case may require, one who from insanity or

¹ Ante, § 622-628.

² And see *Lawrence v. Pullman's Palace Car*, 144 Mass. 1; *Pullman Palace Car v. Reed*, 75 Ill. 125. Consult post, § 1162.

³ *Philadelphia, &c. Rld. v. Larkin*, 47 Md. 155; *Marquette v. Chicago, &c. Rld.* 33 Iowa, 562.

⁴ *Hanson v. European, &c. Ry.* 62 Maine, 84.

other cause has become dangerous to his fellow passengers.¹ So likewise he may put out one who will not pay. All his arrangements must be made with the most exact view to the safety of the service. He does not absolutely guarantee safety, but guarantees the highest endeavor to promote it. He may and does enter into contracts with his passengers; but he cannot, by contract, overturn what is fundamental in the relation of carrier and passenger. Such was the common law before railroads were devised, therefore such is the common law still.

¹ *Atchison, &c. Rld. v. Weber*, 33 Kan. 543; *King v. Ohio, &c. Ry.* 22 Fed. Rep. 413.

CHAPTER XLV.

TRAVELLING BY STREET CARS.

§ 1116. *Differing from Steam.* — It has been well observed that steam-power is more difficult of control than horse-power, so the same negligent act of the passenger, “such as voluntarily and unnecessarily riding on the platform of the cars,” is regarded as somewhat more recriminatory in the former than in the latter.¹ On the other hand, a horse-car, crossing the track² of a steam road, is performing one of the most dangerous acts known in travel; therefore, “under such circumstances,” the driver, to quote from a case in which the question was specifically examined, is “bound to use the highest degree of care and prudence, the utmost human skill and foresight.”³ These seemingly divergent opinions are not truly such, but are particular applications, to differing facts, of the one uniform truth of the common law, that due care varies in degree with the danger, and the gravity of the consequences of a miscarriage.⁴ And, —

§ 1117. *In the last Chapter,* — our examinations of the doctrines of steam-car travel gave us an almost complete view of the body of rules which apply equally also to travel by horse cars. For we have just seen, that all public carriage of passengers is regulated by old and uniform rules of the common law; and, though vehicles may change, and improvements may multiply, the common law is the same system of reason to-day which it was in its earlier years.⁵ This chap-

¹ Devens, J. in *Murphy v. Union Rld.* 102 N. Y. 66, 69, opinion by Ry. 118 Mass. 228, 230. Earl, J.

² Ante, § 1039, 1040.

⁴ Ante, § 1064, 1094.

³ *Coddington v. Brooklyn Crosstown*

⁵ Ante, § 1115.

ter, therefore, may be brief; yet something seems desirable, thus, —

§ 1118. **Carrier's Duty defined.** — Passenger carriers by street cars owe no duty of carefulness to trespassers, but are responsible for any wanton injury to them;¹ they must at the appointed times² accept as passengers and transport all proper persons offering, and conforming to uniform rules for the payment of fare, whom by reasonable efforts they can accommodate;³ must keep order in their cars, for which purpose they may refuse or eject disorderly, dangerous, or otherwise unfit persons;⁴ and must put forth the degree of effort required of other common carriers of passengers⁵ to render and keep their tracks and vehicles safe,⁶ and carry their passengers safely.⁷ For an injury or loss to one not himself in fault, from a violation of any of these duties, an action against the road will lie.⁸ Some of the particulars are —

§ 1119. **Position in Car.**⁹ — The passenger, if he would avoid the plea of contributory negligence on being injured by an accident,¹⁰ should, heeding the rules of the road, abstain from needlessly taking, in the car, a position of special danger. The place deemed most completely safe is a seat inside, next

¹ Ante, § 1094, and places there cited; *Biddle v. Hestonville, &c. Ry.* 2 Am. Pa. 551; *Hearn v. St. Charles Street Rld.* 34 La. An. 160; *Lott v. New Orleans City, &c. Rld.* 37 La. An. 337; *Ekman v. Minneapolis Street Ry.* 34 Minn. 24; *Lovett v. Salem, &c. Rld.* 9 Allen, 557.

² Ante, § 1059; *Pleasants v. North Beach, &c. Rld.* 34 Cal. 586.

³ Ante, § 1061, 1062.

⁴ Ante, § 1068, 1090, 1097, 1115; *Murphy v. Union Ry.* 118 Mass. 228; *Vinton v. Middlesex Rld.* 11 Allen, 304; *Lemont v. Washington, &c. Rld.* 1 Mackey, 180; *Putnam v. Broadway, &c. Rld.* 55 N. Y. 103; *Hadencamp v. Second Avenue Rld.* 1 Sweeny, 490; *West Chester, &c. Rld. v. Miles*, 5 Smith, Pa. 209.

⁵ Ante, § 1063, 1064.

⁶ *East Saginaw City Ry. v. Bohn*, 27

Mich. 503; *Conroy v. Twenty-third Street Rld.* 52 How. Pr. 49.

⁷ *Maverick v. Eighth Avenue Rld.* 36 N. Y. 378; *Pendleton Street Rld. v. Shires*, 18 Ohio State, 255; *Chicago City Ry. v. Young*, 62 Ill. 238; *Liddy v. St. Louis Rld.* 40 Mo. 506; *Baltimore, &c. Road v. Leonhardt*, 66 Md. 70.

⁸ *Louisville, &c. Rld. v. Smith*, 2 Duv. 556; *McIntire Street Ry. v. Bolton*, 43 Ohio State, 224; *Quinlan v. Sixth Avenue Rld.* 4 Daly, 487; *Healey v. City Passenger Rld.* 28 Ohio State, 23; *Feital v. Middlesex Rld.* 109 Mass. 398, and preceding cases.

⁹ As to steam car, see ante, § 1106.

¹⁰ *Liddy v. St. Louis Rld.* 40 Mo. 506; *Federal Street, &c. Ry. v. Gibson*, 15 Norris, Pa. 83; *Dietrich v. Baltimore, &c. Ry.* 58 Md. 347; *Clark v. Eighth Avenue Rld.* 36 N. Y. 135.

is an inside standing, next the rear platform, and the most dangerous is the front platform. But no position permitted by the conductor¹ to a passenger is, when the car is crowded and there is no safer, such in danger as to constitute the taking of it without his dissent contributory negligence; though, in general, this is a question for the jury.² Even where the car is not crowded, a position on the platform will not ordinarily be deemed so unsafe, if assumed without dissent from the conductor, as to be contributory negligence in law, excluding the jury's consideration of it.³ If, contrary to a rule of the road which is posted where the passenger reads it, he takes a position on the front platform when the crowd in the car is such as to permit no safer, he will not be chargeable with contributory negligence.⁴ And putting one's elbow out of the window of a street car is not negligence *per se*.⁵ In the several cases cited to this section the facts may be deemed special, all more or less differing, and the observations upon them differ accordingly. So it will be in the future, onward through all time.⁶ And so the law will in all things continue to be rule, while the shifting facts are the unstable substances to which the rule is applied.

§ 1130. **Stopping.**—In getting on or off a passenger, the car should be brought to a full stop, and so remain long

¹ *Passenger R.R. v. Young*, 20 Ohio State, 538; *Dale v. Brooklyn &c. R.R.*, 3 Thomp. & C. 486, 1 Hun. 386; *Higgins v. Waterbury Thomp. & R.R.*, 46 N. Y. 22. But a mere driver has little or no passenger control. *Baltimore &c. Ry. v. Wilkinson*, 39 Md. 112. *See* *Wilton v. Middlesex R.R.*, 117 Mass. 198; *Mulholland v. Brooklyn City R.R.*, 39 N. Y. 370.

² *Dixon v. Brooklyn City &c. R.R.*, 101 N. Y. 179; *Ginn v. Second Avenue R.R.*, 47 N. Y. 596; *Germantown Pass. Ry. v. Walling*, 1 Ont. Pa. 35; *Lapierre v. Middlesex R.R.*, 144 Mass. 86; *Cosens v. Second Avenue R.R.*, 41 Hun, 364.

³ *Nolan v. Brooklyn City &c. R.R.*, 47 N. Y. 61. *Magnus v. Middlesex R.R.*, 115 Mass. 234; *West Philadelphia*

Pass. Ry. v. Gallagher, 15 Ont. Pa. 512; *Augusta &c. R.R. v. Meaz*, 55 Ga. 124; *Mercer v. Lynn &c. R.R.*, 6 Allen, 224. *See* *Andrews v. Capital &c. R.R.*, 2 Maryland, 137; *Swamy v. Hendrie*, 46 Mich. 494.

⁴ *Hadacamp v. Second Avenue R.R.*, 1 Swamy, 490.

⁵ *Summers v. Crescent City R.R.*, 24 La. An. 129; *Germantown Pass. Ry. v. Brough*, 1 Ont. Pa. 35. Compare with note, § 1091, 1107.

⁶ And consult *Chicago City Ry. v. Young*, 61 Ill. 238; *Baltimore &c. R.R. v. Lombard*, 66 Md. 70; *Chicago &c. Ry. v. Hughes*, 40 Ill. 170; *Wood v. Central Park &c. R.R.*, 11 Mich. Pr. N. S. 411, 41 How. Pr. 289; *People's Passenger Ry. v. Green*, 36 Md. 61.

enough reasonably to avoid accidents; and, for an injury resulting to a non-negligent passenger from a neglect of this duty, the road will be liable.¹ Still,—

§ 1121. **Getting on.**—In most circumstances, the boarding of a moving horse-car is not so obviously negligence as to be such in law; but it may be in exceptional cases, by reason of its palpable danger. Commonly the question is of fact for the jury.²

§ 1122. **Leaving.**—A passenger wishing to leave a moving horse-car should notify the conductor; in the absence of which, or of any knowledge that he is alighting, the road will not be responsible for injuries to him produced by ordinary movements of the car.³ But when, from any other cause, the car has stopped at a usual alighting-place, no notice from the passenger to the conductor is required; the car should not be started until it is seen that no one is getting off, and for an injury through a neglect of this duty the road will be answerable.⁴ Other questions, connected with alighting, may arise; but all are governed by the ordinary rules of negligence and contributory negligence.⁵

§ 1123. **Sudden Jerkings.**—Injuries to passengers caused by sudden jerkings of the car, avoidable by careful driving, will ordinarily charge the road,⁶ except when they are contributorily negligent.⁷

¹ *Crissey v. Hestonville, &c. Ry.* 25 Smith, Pa. 83; *Poulin v. Broadway, &c. Rld.* 61 N. Y. 621; *Wardle v. New Orleans City Rld.* 35 La. An. 202; *Van de Venter v. Chicago City Ry.* 26 Fed. Rep. 32.

² *Eppendorf v. Brooklyn City, &c. Rld.* 69 N. Y. 195; *McDonough v. Metropolitan Rld.* 137 Mass. 210; *Conner v. Citizens Street Ry.* 105 Ind. 62; *Van de Venter v. Chicago City Ry.* 26 Fed. Rep. 32. See *Baltimore, &c. Ry. v. Wilkinson*, 30 Md. 224. It is more clearly negligence to attempt to board a moving train on an elevated road. *Solomon v. Manhattan Ry.* 103 N. Y. 437.

³ *Nichols v. Middlesex Rld.* 106 Mass. 463.

⁴ *Chicago West Div. Ry. v. Mills*, 105 Ill. 63. And see *Rathbone v. Union Rld.* 13 R. I. 709.

⁵ *Dimmey v. Wheeling, &c. Rld.* 27 W. Va. 32; *Hagan v. Philadelphia, &c. Ry.* 15 Philad. 278; *Neslie v. Second and Third Streets Pass. Ry.* 3 Am. Pa. 300; *Nissen v. Missouri Rld.* 19 Mo. Ap. 662; *Fleck v. Union Ry.* 134 Mass. 480; *Brown v. Congress, &c. Street Ry.* 49 Mich. 153.

⁶ *Saare v. Union Ry.* 20 Mo. Ap. 211.

⁷ *Hayes v. Forty-second Street, &c. Rld.* 97 N. Y. 259; *Ashbrook v. Frederick Avenue Ry.* 18 Mo. Ap. 290.

§ 1124. **Children.** — To clearly understand the relations of young children to the road, the reader should consult the expositions of a preceding chapter.¹ A young child, or a person sick² or from old age infirm, is entitled to a consideration from the road in proportion to his feebleness and needs.³ One four years old cannot be contributorily negligent, and the road may be even responsible for not either compelling him to occupy a place of safety or stopping the car and putting him off.⁴ As the child increases in years the road's special responsibilities to him become less, and gradually contributory negligence comes in as a constantly augmenting element in the defence.⁵

§ 1125. **Fares.** — The doctrine of fares and tickets is substantially the same as in steam car travel, explained in the last chapter.⁶

§ 1126. *The Doctrine of this Chapter restated.*

The law of travel by common carrier is as old as the common law whereof it is a part. The distinguishing of travel into that by steam cars, by horse cars, by water conveyance, and the like is simply for the reader's convenience; all forms of it are governed by the same fundamental rules. The leading travel being with us by steam cars, the present author's expositions are chiefly under the former head, and the brief ones of the present chapter need not be further repeated.

¹ Ante, § 553-559, 570-590.

² Ante, § 1100.

³ *Sheridan v. Brooklyn City, &c. Rld.* 36 N. Y. 39; *Drew v. Sixth Avenue Rld.* 1 Abb. Ap. 556.

⁴ Ante, § 586; *Pittsburg, &c. Ry. v. Caldwell*, 24 Smith, Pa. 421; *East Saginaw City Ry. v. Bohn*, 27 Mich. 503.

⁵ *Philadelphia, &c. Ry. v. Hassard*, 25 Smith, Pa. 367; *Cram v. Metro-*

politan Rld. 112 Mass. 38; *Maher v. Central Park, &c. Rld.* 67 N. Y. 52; *Muehlhausen v. St. Louis Rld.* 91 Mo. 332.

⁶ Some cases are *Bradshaw v. South Boston Rld.* 135 Mass. 407; *Cronin v. Highland Street Ry.* 144 Mass. 249; *Baltimore, &c. Road v. Boone*, 45 Md. 344; *Corbett v. Twenty-third Street Ry.* 42 Hun, 587.

CHAPTER XLVI.

TRAVELLING BY OTHER PUBLIC CONVEYANCE.

§ 1127, 1128. Introduction.

1129-1135. By Land.

1136-1140. By Water.

1141. Doctrine of Chapter restated.

§ 1127. **How Chapter divided.**—We shall consider the travel of this chapter as to, I. By Land ; II. By Water.

§ 1128. **Already,**—in the last two chapters, we have had a view of the principles which govern the subjects of these two sub-titles ; being deductions, by the reasonings of the common law, from the nature of public travel and its relations to society, therefore not dependent on any particular form of such travel, but applicable equally to all forms.¹ It remains, under the present heads, to look simply at some special details.

I. *By Land.*

§ 1129. **What Care.**—The common carrier of passengers by coach or other like vehicle owes to them, not the mere ordinary diligence, but the very high or utmost care described in a preceding section.² Therefore he must furnish good and properly constructed coaches, with safe stowings away of passengers and baggage,³ gentle and well broken horses, good harnesses, and a skilful and prudent driver. And for an accident to a non-negligent passenger, proceeding from any negligence in the making of these preparations, or negligence in however competent a driver, or otherwise in the journey, he

¹ Explained, ante, § 1115, 1116, ² Curtis v. Drinkwater, 2 B. & Ad. 1117, 1126. 169.

³ Ante, § 1064.

will be responsible.¹ But he is not an insurer of the passenger's safety;² and is, therefore, not answerable for inevitable accidents, not attributable to any lack of care on the part of either himself or servants.³ Thus, —

§ 1130. **Latent Defects.** — Though the utmost diligence is required of the carrier to ascertain defects in the coach, still if it breaks down through some undiscoverable imperfection, — such as a small and concealed flaw in an iron, eluding the most careful inspection, — a passenger injured by the breaking is without remedy.⁴

§ 1131. **All Applicants.** — The duty to accept and transport all applicants binds as well the sort of carrier we are considering as others.⁵

§ 1132. **In other Respects,** — the rules explained in the last two chapters apply to this older form of land carriage; as, —

§ 1133. **Presumed.** — From an injury to the passenger, the carrier's negligence is ordinarily *prima facie* presumed.⁶

§ 1134. **Vehicle Crowded.** — The passenger's taking, in a crowded vehicle, an insecure seat with the consent of the carrier who furnishes no safer, will not, as contributory negligence, bar the action for an injury resulting.⁷

¹ McKinney v. Neil, 1 McLean, 540; Peck v. Neil, 3 McLean, 22, 26; Sales v. Western Stage Co. 4 Iowa, 547; Farish v. Reigle, 11 Grat. 697; Geddes v. Metropolitan Rld. 103 Mass. 391; Gallagher v. Bowie, 66 Texas, 265; McLane v. Sharpe, 2 Harring. Del. 481; White v. Boulton, Peake, 81; Dudley v. Smith, 1 Camp. 167; Lemon v. Chanslor, 68 Mo. 340.

² Ante, § 1063.

³ Christie v. Griggs, 2 Camp. 79; Crofts v. Waterhouse, 3 Bing. 319, 11 Moore, 133; Stockton v. Frey, 4 Gill, 406; Stokes v. Saltonstall, 13 Pet. 181; Aston v. Heaven, 2 Esp. 533; Harris v. Costar, 1 Car. & P. 636; McClenaghan v. Brock, 5 Rich. 17.

⁴ Ingalls v. Bills, 9 Met. 1. See McPadden v. New York Cent. Rld. 44 N. Y. 478; ante, § 644, 645. It will be seen, from the last cited case and

cases to which it refers, that the true doctrine on this point has been occasionally overlooked. To deny the proposition embodied in the text of this section, and at the same time to hold to the universal doctrine that the carrier is not the insurer of the passenger's safety, would introduce into the law of this subject a contradiction; and, what is more, it would repudiate the great and universal truth that the common law is a system of reasoning.

⁵ Ante, § 1052-1062; Messiter v. Cooper, 4 Esp. 269; Bennett v. Dutton, 10 N. H. 431, 436.

⁶ Ante, § 1065; Lemon v. Chanslor, 68 Mo. 340; Stokes v. Saltoucall, 13 Pet. 181; Lawrence v. Green, 70 Cal. 417; Roberts v. Johnson, 58 N. Y. 613.

⁷ Ante, § 1119; Spooner v. Brooklyn City Rld. 54 N. Y. 230.

§ 1135. **Trespasser — Free.** — The carrier owes no duty of carefulness to a trespasser on his coach.¹ For example, a livery-stable keeper furnished gratuitously a carriage to bring performers from a charitable entertainment. With them, another person got into the coach; and, when they had left it, the horses ran away, injuring this person. The stable-keeper was held not to be liable.² But it will not relieve the carrier that the passenger has his ride free.³

II. *By Water.*

§ 1136. **General.** — The rules for passenger carriage by land apply equally to that by water.⁴ Thus, —

§ 1137. **Passenger — Injuries to.** — One who in good faith goes upon a passenger steamer, intending to be carried, is a passenger,⁵ whether fare has been paid or not;⁶ and to him the boat or person who runs it owes the ordinary duties due from carrier to passenger.⁷ And if, through any defect in the internal structure or arrangements of the boat,⁸ a non-negligent passenger is injured, — as, by putting his foot or falling into a hole left at a place where he has the right to be,⁹ or by a fall caused by the lack of a rail where there should be one,¹⁰ — he is entitled to compensation. But one cannot have damages for an injury accidentally befalling him while trespassing¹¹ upon a part of the boat forbidden to passengers. This is so even in the case of a child too young to exercise a discretion.¹²

§ 1138. **Protection.** — The carrier by water owes to his passengers the same protection which is due from other carriers.¹³

¹ Ante, § 1094, 1118.

² Siegrist v. Arnot, 86 Mo. 200.

³ Ante, § 1092, 1094; Lemon v. Chanslor, 68 Mo. 340.

⁴ Ante, § 1128.

⁵ Ante, § 1092-1094.

⁶ Ante, § 1135.

⁷ Cleveland v. New Jersey Steam. Co. 68 N. Y. 306; Carroll v. Staten Island Rld. 53 N. Y. 126; Sherlock v. Alling, 44 Ind. 184; Julien v. The Wade Hampton, 27 La. An. 377.

⁸ Ante, § 927, 1104, 1129.

⁹ Bowman v. California Steam Nav. Co. 63 Cal. 181; The Joseph Stickney, 31 Fed. Rep. 156.

¹⁰ American Steams. Co. v. Landreth, 12 Out. Pa. 264.

¹¹ Ante, § 1135.

¹² The Burgundia, 29 Fed. Rep. 464. And see ante, § 927.

¹³ Ante, § 1068, 1090.

For example, if his servants assault them, they may have damages of him or the vessel.¹

§ 1139. **Embarking and Disembarking.**— The passages to and from the vessel should be made and kept safe.² And a passenger injured through a neglect of this or any other duty connected with the embarking or disembarking may, if himself without fault, have his damages.³ And he will not ordinarily be chargeable with contributory negligence if, while getting on or off a boat, he follows the directions of its officers.⁴

§ 1140. **Ferry.**— We have seen that a ferry is a particular sort of public way, while at the same time its proprietor is a carrier of passengers.⁵ Whether fare has been paid or not,⁶ he owes to them the common carrier's duty of carefulness;⁷ and, for an injury to a non-negligent passenger through a neglect of it, he will be answerable, but not to a negligent one.⁸ A woman on a ferry-boat should have a seat;⁹ but, where there are seats enough for ordinary occasions, her failure to obtain one when the boat is specially crowded will not entitle her to damages for an injury which she would have escaped in a seat.¹⁰

§ 1141. *The Doctrine of this Chapter restated.*

This chapter consists of showing the applications of the common law of passenger carriage to some particular sorts of carriers of passengers. It brings to view no principles not stated in preceding chapters. Therefore further repetitions are not desirable.

¹ Springer Transp. Co. v. Smith, 16 Lea, 498; New Jersey Steamb. Co. v. Brockett, 121 U. S. 637. See Simonin v. New York, &c. Rld. 36 Hun, 214.

² Ante, § 852, 876, 1086, 1100; Post v. Koch, 30 Fed. Rep. 208.

³ Hrebrik v. Carr, 29 Fed. Rep. 298; Julien v. The Wade Hampton, 27 La. An. 377.

⁴ Clinton v. Root, 58 Mich. 182. See ante, § 1089, 1099-1101.

⁵ Ante, § 954.

⁶ Ante, § 1135, 1137.

⁷ Ante, § 1063, 1064.

⁸ Doran v. East River Ferry, 3 Lans. 105; New Jersey Rld. v. Palmer, 4 Vroom, 90; Ladd v. Foster, 31 Fed. Rep. 827; Hazman v. Hoboken Land, &c. Co. 2 Daly, 130; Dwyer v. New York, &c. Ry. 18 Vroom, 9; Dudley v. Camden, &c. Ferry, 16 Vroom, 368; Joy v. Winnisimmet Co. 114 Mass. 63; Peverly v. Boston, 136 Mass. 366; The Manhasset, 19 Fed. Rep. 430.

⁹ Ante, § 1091.

¹⁰ Burton v. West Jersey Ferry, 114 U. S. 474.

CHAPTER XLVII.

TRAVELLING BY PRIVATE CONVEYANCE AND ON FOOT.

§ 1142. **Distinguished.** — One travelling in his own or a hired vehicle or on foot is not a common carrier of himself. Therefore the doctrines special to the last three chapters do not govern the subject of this one.

§ 1143. **Already,** — in a preceding chapter, the use of the public ways has been explained.¹ And such use constitutes the chief part of private travelling. So, also, —

§ 1144. **Imputed Negligence.** — In a preceding chapter, we considered the untenable doctrine of imputed contributory negligence, held by a few of the courts, and oftenest applied to one privately travelling with another who is independently driving.² We are thus led to the related question of —

§ 1145. **Driver as Servant.** — Whether we consult that reason which constitutes the common law, or the general current of the adjudications, the result is, that the rights and liabilities of one riding in a carriage driven by another, growing out of the conduct of the latter, depend on whether or not the relation between them is that of master and servant, or, in other words, whether the one riding controls or is entitled to control the movements of the one driving.³ And plainly, in our system of jurisprudence, this is a question for the jury. An English case, much commented on and much followed both in England and this country, holds, as of law, that, if the owner of a carriage hires from another horses with a driver, and thus goes into the public ways, he is not answerable for injuries

¹ Ante, § 947-1022, more particularly § 1005-1021.

² Ante, § 1070.

³ Ante, § 599, 600, 602, 609, 1067-1070.

to a third person from this driver's negligence, in a matter not specifically either commanded or forbidden.¹ And an American case holds, that, in such circumstances, the owner of the horses, who is the driver's general master, is liable.² To the writer it appears, that the facts of cases within this outline will differ,—as, in the English one, the carriage was owned by two old ladies, and the horses and driver were supplied by a person whose vocation it was to do this sort of service, so that the ladies were substantially in the position of a person employing professional aid, while the facts in other cases may be the reverse of these,—and the jury should determine in whom was the control in the particular instance.

§ 1146. *Injured in Way.*—One injured while driving in the highway, not being himself in fault,³ may recover his damages of the person or corporation whose fault caused the injury; as, the municipal⁴ or turnpike⁵ corporation that should keep the way in repair but did not, or a private person from whose negligent driving⁶ or other negligence⁷ or wilful wrong⁸ the harm proceeded. Specially as to—

§ 1147. *Railroads.*—A railroad corporation has the same right to run its cars as a private person to travel on the public road. But each is within the common rule which forbids one needlessly or negligently to injure another.⁹ If, therefore, the railroad track and highway are parallel, a traveller on the latter cannot complain, though his horse is frightened by smoke and noise necessarily attending the operations upon the former.¹⁰ Yet to frighten a horse on a road by unnecessary noise or smoke, resulting in harm, is an actionable

¹ Quarman v. Burnett, 6 M. & W. 499. Kansas, 54 Mo. 598; Hubbell v. Yonkers, 104 N. Y. 434.

² Joslin v. Grand Rapids Ice Co. 50 Mich. 516, where many cases are cited. ⁵ Baltimore, &c. Turnp. v. Cassell, 66 Md. 419.

³ Schaabs v. Woodburn Sarven Wheel Co. 56 Mo. 173; Parish v. Eden, 62 Wis. 272; Mahoney v. Metropolitan Rld. 104 Mass. 73; Templeton v. Montpelier, 56 Vt. 328; Buesching v. St. Louis Gas-light Co. 73 Mo. 219. ⁶ Smith v. Consumer's Ice Co. 52 N. Y. Super. 430.

⁷ Ante, § 1018.

⁸ Lewis v. Bulkley, 4 Daly, 156.

⁹ Ante, § 637, 673, 898.

¹⁰ Lamb v. Old Colony Rld. 140 Mass. 79.

⁴ Ante, § 959, 960, 1019; Hull v.

wrong.¹ And the omission by a railroad of required signals,² bringing harm to a traveller on the highway, will subject it to damages;³ though the rule is otherwise as to a person not a traveller, to whom the railroad owes no duty of carefulness.⁴ In short, any negligence by the road, calculated to bring damage to an individual to whom it owes the duty of carefulness, will make it liable to him if he is free from negligence, otherwise it will not.⁵

§ 1148. **Foot-travellers** — are within the same rules as travellers by private carriage. If, for example, a non-negligent one⁶ is injured by the runaway horse of a negligent person, he may have compensation.⁷ And it is the same where the injury comes from any other negligence of any other person or corporation. But the injured one must be free from negligence.⁸

§ 1149. *The Doctrine of this Chapter restated.*

Private travelling is commonly a particular use of the public ways, explained in a preceding chapter. If the traveller receives an injury from the joint negligence of himself and another person or corporation, he must bear it uncompensated. And however free from fault he may be himself, the result is still the same unless he can show fault in the one from whom the injury proceeds. On showing such fault, he may have his damages.

¹ Cole v. Fisher, 11 Mass. 137.

² Ante, § 1026, 1038.

³ Cosgrove v. New York Cent. &c. Rld. 87 N. Y. 88.

⁴ St. Louis, &c. Ry. v. Payne, 29 Kan. 166.

⁵ Mann v. Central Vermont Rld. 55 Vt. 484; Jones v. Housatonic Rld. 107 Mass. 261; Watson v. Wabash, &c. Ry. 66 Iowa, 164; Pennsylvania Rld. v. Goodman, 12 Smith, Pa. 329; Chicago, &c. Rld. v. Bell, 70 Ill. 102.

⁶ Schienfeldt v. Norris, 115 Mass. 17.

⁷ Williams v. Grealy, 112 Mass. 79.

⁸ Hassenyer v. Michigan Cent. Rld. 48 Mich. 205; Tully v. Fitchburg Rld. 134 Mass. 499; Eaton v. Erie Ry. 51 N. Y. 544; Childs v. New Orleans City Rld. 33 La. An. 154; Belton v. Baxter, 14 Abb. Pr. n. s. 404; Simons v. Gaynor, 89 Ind. 165; Scranton v. Hill, 6 Out. Pa. 378; Oil City, &c. Bridge v. Jackson, 4 Am. Pa. 321; Bulger v. Albany Ry. 42 N. Y. 459; Shea v. Sixth Avenue Rld. 62 N. Y. 180.

CHAPTER XLVIII.

BAGGAGE.

§ 1150. Introduction.

1151-1153. General Doctrine.

1154-1162. Specific Questions.

1163. Doctrine of Chapter restated.

§ 1150. **How Chapter divided.** — We shall consider this subject as to, I. The General Doctrine ; II. Some Specific Questions.

I. *The General Doctrine.*

§ 1151. **Defined.** — Whether we contemplate the duty of a common carrier of passengers as proceeding from the law¹ or from contract, it binds him to receive and convey with the passenger, and as a part of his undertaking, the passenger's personal baggage, commonly in England and sometimes in this country termed luggage.² And, —

§ 1152. **Nature and Extent of Liability.** — For the safety of the baggage, the carrier is not simply to exercise the extreme care required in the carriage of the person ;³ but, as in the carriage of merchandise,⁴ he is the insurer of its safety except against the two forms of overwhelming force⁵ termed the acts

¹ Ante, § 1058-1062.

² *Hawkins v. Hoffman*, 6 Hill, N. Y. 586 ; *Great Northern Ry. v. Shepherd*, 8 Exch. 30 ; *Michigan Cent. Rld. v. Carrow*, 73 Ill. 348 ; *Orange County Bank v. Brown*, 9 Wend. 85 ; *Peixotti v. McLaughlin*, 1 Strob. 468 ; *Woods v. Devin*, 13 Ill. 746 ; *Bomar v. Maxwell*, 9 Humph. 621.

³ Ante, § 1063, 1064.

⁴ *Bishop Con.* § 596 ; *Coggs v. Bernard*, Holt, 131 ; *Bohannon v. Hammond*, 42 Cal. 227.

⁵ Ante, § 166, 173 ; *Swetland v. Boston, &c. Rld.* 102 Mass. 276, 282 ; *Forward v. Pittard*, 1 T. R. 27 ; *Amies v. Stevens*, 1 Stra. 128 ; *Dale v. Hall*, 1 Wils. 281 ; *Price v. Hartshorn*, 44 N. Y. 94 ; *Colt v. McMechen*, 6 Johns. 160 ; *Elliott v. Rossell*, 10 Johns. 1.

of God and of the public enemy.¹ For example, if it is burned,² stolen,³ or lost,⁴ though not through his negligence, or if he delivers it to the wrong person on a forged order,⁵ or if it is taken from him by a private robber,⁶ he must make good its value.

§ 1153. **On Free Ticket.** — To subject the common carrier of goods to this liability in its full extent,⁷ the carriage must be for hire.⁸ Hence one travelling on a free ticket, though entitled to the protection of a passenger as to his person,⁹ can, as to his baggage, claim of the carrier only the carefulness due from a gratuitous bailee, whose responsibility for losses is limited to those resulting from his negligence.¹⁰ A passenger's payment of fare includes the carriage of the baggage, equally with that of the person.¹¹

II. *Some Specific Questions.*

§ 1154. **Baggage or not.** — Since, as just seen, the carrier's responsibilities for baggage and for merchandise are the same, it is immaterial to the rights of the parties, in the absence of fraud, whether the effects accepted to be carried with the passenger are called baggage or merchandise. The two tests are, whether or not there is fraud, and whether or not the carriage is to be paid for. If, for example, what is offered to

¹ Lovett v. Hobbs, 2 Show. 127; Hannibal, &c. Rld. v. Swift, 12 Wal. 262; Minter v. Pacific Rld. 41 Mo. 503; Merrill v. Grinnell, 30 N. Y. 594; Roth v. Buffalo, &c. Rld. 34 N. Y. 548, 551; Hollister v. Nowlen, 19 Wend. 234.

² Chamberlain v. Western Transp. Co. 45 Barb. 218.

³ McQuesten v. Sanford, 40 Maine, 117; Toledo, &c. Ry. v. Hammond, 33 Ind. 379.

⁴ Brooke v. Pickwick, 4 Bing. 218, 12 Moore, 447.

⁵ Powell v. Myers, 26 Wend. 591.

⁶ Forward v. Pittard, 1 T. R. 27, 34; Hollister v. Nowlen, *supra*, at p. 238.

⁷ Coggs v. Bernard, 2 Ld. Raym. 909.

⁸ Ante, § 954, note; Middleton v. Fowler, 1 Salk. 282, Skin. 625; Lane v. Cotton, 1 Salk. 143; Gray v. Missouri River Packet, 64 Mo. 47.

⁹ Ante, § 1076, 1092.

¹⁰ Flint, &c. Ry. v. Weir, 37 Mich. 111; implied in *dictum* of Smith, J. in Roth v. Buffalo, &c. Rld. 34 N. Y. 548, 551.

¹¹ Ante, § 1151; Wilson v. Grand Trunk Ry. 56 Maine, 60; Collins v. Boston, &c. Rld. 10 Cush. 506, 507; The Elvira Harbeck, 2 Blatch. 336. And see Van Horn v. Kermit, 4 E. D. Smith, 453; McGill v. Rowand, 3 Barr, 451; Malone v. Boston, &c. Rld. 12 Gray, 388.

the carrier as baggage is plainly and obviously not such, but some other sort of personalty, yet he, not being deceived, chooses to accept it as baggage, it takes the place of real baggage, the ticket pays for the carriage of it¹ the same as of the person, and the parties are mutually estopped to deny that it is baggage.² An illustration of this is a tent received by the carrier to be transported as baggage, he is responsible for its loss.³ Or, if the carrier accepts merchandise to carry it in the form of baggage with the passenger, and charges for it extra, he is in like manner responsible.⁴ Now, —

§ 1155. **Not Disclosing.** — If the passenger presents to the carrier merchandise in the form of baggage, and the latter, being told or assuming from its appearance that it is such, accepts it as baggage, when if he had known the facts he might have declined it or taken extra pay, he is in law defrauded, whether a fraud was in fact meant or not. The most favorable view for the passenger is, that the carriage was to be gratuitous; and, in any possible view, the carrier is not responsible for its accidental loss.⁵ This is a common case in travel and, with respect to it, —

§ 1156. **What is Baggage.** — The adjudications on this ques-

¹ Ante, § 1153.

² *Hoefer v. Chicago, &c. Ry.* 63 Wis. 100; *Stoneman v. Erie Ry.* 52 N. Y. 429; *Cahill v. London, &c. Ry.* 13 C. B. N. s. 818, 8 Jur. N. s. 1063; *Great Northern Ry. v. Shepherd*, 8 Exch. 30, 38. Consult, and perhaps as contra, *Belfast, &c. Ry. v. Keys*, 9 H. L. Cas. 556, 8 Jur. N. s. 367, and places there referred to. And see *Michigan, &c. Rld. v. Oehm*, 56 Ill. 293; *Butler v. Hudson River Rld.* 3 E. D. Smith, 571; *Illinois Cent. Rld. v. Tronstine*, 64 Missis. 834; *Alling v. Boston, &c. Rld.* 126 Mass. 121. Some of these cases perhaps seem to or do cast doubt upon the doctrine of the text. And it has been suggested, in respect of carriage by rail, that, in the absence of special proof, the baggage-master has no presumptive authority to bind the road by accepting for baggage what is not

such in fact. *Blumantle v. Fitchburg Rld.* 127 Mass. 322. But it is emphatically within a baggage-master's duty to determine what is baggage and what is not; hence, within familiar rules, if he accepts as baggage what is not such, he binds his employer even though he disobeys instructions. Ante, § 609-615.

³ *Chicago, &c. Rld. v. Conklin*, 32 Kan. 55.

⁴ *Sloman v. Great Western Ry.* 67 N. Y. 208; *Perley v. New York Cent. &c. Rld.* 65 N. Y. 374; *Hannibal, &c. Rld. v. Swift*, 12 Wal. 262; *Hellman v. Holladay*, 1 Woolw. 365; *Stoneman v. Erie Ry.* supra.

⁵ *Cincinnati, &c. Rld. v. Marcus*, 38 Ill. 219; *Michigan Cent. Rld. v. Carrow*, 73 Ill. 348; *Hellman v. Holladay*, 1 Woolw. 365; *Pennsylvania Co. v. Miller*, 35 Ohio State, 541.

tion appear, at the first impression, a little inharmonious. Their seeming discords will diminish under the consideration that the facts of cases differ with the differing persons and their circumstances and pursuits, with the differing purposes of the travel, the differing inducements to take the several articles claimed as baggage, and various other collateral things of this general sort.¹ For example, the same article may be baggage or not according to the purpose for which it is carried; as, a watch for sale is merchandise, one for time is baggage. With approximate accuracy, baggage may be said to consist of whatever, connected with the objects of the journey, and not exceeding the limits of reason and custom, the traveller takes with him for his personal use, whether during actual travel, or in intervals between trips, or upon its termination.² And it has been held to extend even to what, within the custom of travellers, he carries for his family; as, where one put into his trunk some wearing apparel bought for himself and other members of his family, with materials for two dresses for them, and for a dress "intended for his landlady," all was held to be baggage except the landlady's part. This was deemed not to be such.³ So money for a journey, including a reasonable provision for possible emergencies,⁴ an opera

¹ *Spooner v. Hannibal, &c. Rld.* 23 Mo. Ap. 403.

² *American Contract Co. v. Cross*, 8 Bush, 472; *Kansas City, &c. Rld. v. Morrison*, 34 Kan. 502; *Yznaga Del Valle v. The Richmond*, 27 La. An. 90; *Doyle v. Kiser*, 6 Ind. 242; *Chicago, &c. Rld. v. Collins*, 56 Ill. 212; *Michigan Cent. Rld. v. Carrow*, 73 Ill. 348; *New York Cent. &c. Rld. v. Fraloff*, 100 U. S. 24. "We hold the true rule to be, that whatever the passenger takes with him for his personal use or convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage. This would include, not only all articles of apparel,

whether for use or ornament, . . . but also the gun-case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveller, and the taking of which has arisen from the fact of his journeying." *Cockburn, C. J. in Macrow v. Great Western Ry.* Law Rep. 6 Q. B. 612, 622.

³ *Dexter v. Syracuse, &c. Rld.* 42 N. Y. 326. And see *Duffy v. Thompson*, 4 E. D. Smith, 178; *Nevins v. Bay State, &c. Co.* 4 Bosw. 225.

⁴ *Weeks v. New York, &c. Rld.* 9 Hun, 669; *Jordan v. Fall River Rld.* 5 Cush. 69; *Dunlap v. International, &c. Co.* 98 Mass. 371; *Merrill v. Grinnell*, 30 N. Y. 594.

glass,¹ an author or professional man's manuscripts carried for study or for business connected with his travels,² a mechanic's tools in reasonable quantity,³ a female passenger's apparel including valuable laces,⁴ a watch and chain and finger rings,⁵ a pocket pistol,⁶ and other valuables within the same reason, will ordinarily be deemed baggage. But money packed away simply for transportation,⁷ or otherwise carried for purposes not connected with personal expenses,⁸ is not baggage. It was so held even where the passenger was stripped of sixteen thousand dollars by a robber who entered the carrier's car.⁹ And, though a woman's dress is baggage when she personally carries it for her own use, it is not such in the trunk of the maker who is taking it to her in fulfilment of an order.¹⁰ In short, articles not meant for the use of the traveller or his family, being, for example, carried for sale, are not baggage.¹¹

§ 1157. *Dogs*. — On a question possibly open to some difference of opinion, if a carrier by rail declines, under a rule of the road,¹² to take the dog of a passenger, but permits it to be received by the baggage-master and looked after and transported for a fee which he may retain as a perquisite, the road

¹ Toledo, &c. Ry. v. Hammond, 33 Ind. 379.

² Hopkins v. Westcott, 6 Blatch. 64; New York Cent. &c. Rld. v. Fraloff, 100 U. S. 24. It was in England held that an attorney at law could not recover for the detention or loss of documents belonging to his client, to be used in court, as being baggage. Phelps v. London, &c. Ry. 19 C. B. N. s. 321, 11 Jur. N. s. 652.

³ Kansas City, &c. Rld. v. Morrison, supra; Porter v. Hildebrand, 2 Harris, Pa. 129.

⁴ Fraloff v. New York Cent. &c. Rld. 10 Blatch. 16.

⁵ McCormick v. Hudson River Rld. 4 E. D. Smith, 181; Coward v. East Tennessee, &c. Rld. 16 Lea, 225.

⁶ Woods v. Devin, 13 Ill. 746. In one case it was held that two revolvers in a passenger's lost trunk could not

both be deemed baggage, but he was allowed for one of them. Chicago, &c. Rld. v. Collins, 56 Ill. 212.

⁷ Kuter v. Michigan Cent. Rld. 1 Bis. 35.

⁸ First Nat. Bank v. Marietta, &c. Rld. 20 Ohio State, 259; Orange County Bank v. Brown, 9 Wend. 85.

⁹ Weeks v. New York, &c. Rld. 9 Hun, 669. And see Pfister v. Central Pac. Rld. 70 Cal. 169.

¹⁰ Michigan, &c. Rld. v. Oehm, 56 Ill. 293.

¹¹ Collins v. Boston, &c. Rld. 10 Cush. 506; Stimson v. Connecticut River Rld. 98 Mass. 83; Hawkins v. Hoffman, 6 Hill, N. Y. 586; Dibble v. Brown, 12 Ga. 217; Smith v. Boston, &c. Rld. 44 N. H. 325; Whitmore v. Steamboat Caroline, 20 Mo. 513.

¹² Ante, § 1072.

will not be liable should the dog, the rule being known to the passenger, be lost; ¹ otherwise, where he has no notice of the rule. ²

§ 1158. **Delivery to Carrier.** — For the carrier's responsibilities to attach, there must be some actual or presumptive delivery of the baggage to him. ³ *Prima facie*, a check held by a passenger shows delivery. ⁴ But baggage accepted by the baggage-master is delivered though not checked, ⁵ and so in some circumstances is baggage simply left at the depot for carriage with a passenger. ⁶ The formality of purchasing a ticket is not an indispensable prerequisite. ⁷ But baggage simply intrusted to a freight agent for storage over night, by one who expects to take it the next day to the passenger depot to be carried with himself, is not delivered in the sense we are considering. The road's responsibilities to it are simply those of a gratuitous bailee. ⁸ There are some uncertainties as to unchecked —

§ 1159. **Articles kept about the Person.** — It is not necessary for the passenger, in order to hold the carrier responsible for his baggage, to cease watching it himself. ⁹ On the other hand, one who chooses not to trust the carrier, but to keep his baggage in his exclusive control, cannot recover compensation of him if it is lost. ¹⁰ So where the passenger's own contributory negligence enters into the loss of which he complains, he cannot have compensation; ¹¹ as where, at the end

¹ Honeyman v. Oregon, &c. Rld. 13 Oregon, 352.

² Cantling v. Hannibal, &c. Rld. 54 Mo. 385. See Dickson v. Great Northern Ry. 18 Q. B. D. 176.

³ Gleason v. Goodrich Transp. Co. 32 Wis. 85; Green v. Milwaukee, &c. Rld. 38 Iowa, 100.

⁴ Chicago, &c. Rld. v. Clayton, 78 Ill. 616; Check v. Little Miami Rld. 2 Disney, 237.

⁵ Wilson v. Grand Trunk Ry. 57 Maine, 138; Bunch v. Great Western Ry. 17 Q. B. D. 215; Green v. Milwaukee, &c. Rld. 41 Iowa, 410.

⁶ Green v. Milwaukee, &c. Rld. 38 Iowa, 100. And see Barron v. Eldredge,

100 Mass. 455; Montgomery, &c. Ry. v. Kolb, 73 Ala. 396.

⁷ Lake Shore, &c. Ry. v. Foster, 104 Ind. 293.

⁸ Van Gilder v. Chicago, &c. Ry. 44 Iowa, 548.

⁹ Mudgett v. Bay State Steamb. Co. 1 Daly, 151; Green v. Milwaukee, &c. Rld. 41 Iowa, 410.

¹⁰ The Crystal Palace v. Vanderpool, 16 B. Monr. 302; Abbott v. Bradstreet, 55 Maine, 530; Cohen v. Frost, 2 Duer, 335; The R. E. Lee, 2 Abb. U. S. 49; Clark v. Burns, 118 Mass. 275; First Nat. Bank v. Marietta, &c. Rld. 20 Ohio State, 259.

¹¹ Gonthier v. New Orleans, &c. Rld.

of his journey or while temporarily absent, he leaves his overcoat or other article on the car-seat, forgetting it.¹ If, in travel by water, one leaves his stateroom locked, and an article is stolen from it, or something is purloined from it at night while he is asleep, just principle would appear to hold the carrier liable; but this sort of question has been decided both ways.² A carrier by rail does not cease to be responsible simply because the passenger takes an article into the car with him, instead of having it deposited in the baggage car.³ Of course, however the passenger may keep the article about his person, if the loss of it is traceable to any negligence of the carrier, into which his own does not enter, the carrier is liable.⁴

§ 1160. **Limiting Liability by Contract.** — We have seen that, by the commonly held just doctrine, any contract between carrier and passenger freeing the former from responsibility for his negligence is void as contrary to the law and its policy.⁵ Still the courts will generally give effect to a contract whereby the carrier is released from his common-law duty as an insurer, in the absence of negligence.⁶ And reasonable

28 La. An. 67; *O'Rourke v. Chicago, &c. Ry.* 44 Iowa, 526.

¹ *Tower v. Utica, &c. Rld.* 7 Hill, N. Y. 47; *Illinois Cent. Rld. v. Handy*, 63 Missis. 609; *Whitney v. Pullman's Palace Car*, 143 Mass. 243.

² *American Steamship Co. v. Bryan*, 2 Norris, Pa. 446; *Gore v. Norwich, &c. Transp. Co.* 2 Daly, 254; *The R. E. Lee*, supra; *Crozier v. Boston, &c. Steamb. Co.* 43 How. Pr. 466; *McKee v. Owen*, 15 Mich. 115.

³ *Le Conteur v. London, &c. Ry.* Law Rep. 1 Q. B. 54, 58.

⁴ *Kinsley v. Lake Shore, &c. Rld.* 125 Mass. 54.

⁵ *Ante*, § 1074; *Michigan, &c. Rld. v. Heaton*, 37 Ind. 448; *Ketchum v. American, &c. Express*, 52 Mo. 390; *School District v. Boston, &c. Rld.* 102 Mass. 552; *Southern Express v. Crook*, 44 Ala. 468; *Christenson v. American Express*, 15 Minn. 270; *New York Cent. Rld. v. Lockwood*, 17 Wal. 357;

Ohio, &c. Ry. v. Selby, 47 Ind. 471; *Higgins v. New Orleans, &c. Rld.* 28 La. An. 133; *United States Express v. Kountze*, 8 Wal. 342; *Simon v. The Fung Shuey*, 21 La. An. 363; *Lamb v. Camden, &c. Transp. Co.* 2 Daly, 454; *Erie Ry. v. Lockwood*, 28 Ohio State, 358; *United States Express v. Backman*, 28 Ohio State, 144; *Gaines v. Union Transp. &c. Co.* 28 Ohio State, 418; *Galt v. Adams Express*, 4 MacArthur, 124; *Cleveland, &c. Rld. v. Curran*, 19 Ohio State, 1; *Cincinnati, &c. Rld. v. Pontius*, 19 Ohio State, 221; *Knowlton v. Erie Ry.* 19 Ohio State, 260; *Moulton v. St. Paul, &c. Ry.* 31 Minn. 85.

⁶ *New York Cent. &c. Rld. v. Fraloff*, 100 U. S. 24, 27; *Hoadley v. Northern Transp. Co.* 115 Mass. 304; *Camp v. Hartford, &c. Steamb. Co.* 43 Conn. 333; *Rand v. Merchants Despatch Transp. Co.* 59 N. H. 363; *Illinois Cent. Rld. v. Jonte*, 13 Bradw. 424.

limitations in other respects are permitted;¹ unreasonable ones are not.² But the limitation cannot be made by a mere rule³ of the carrier company, or a notice printed on the back of a receipt⁴ or on the front of the ticket,⁵ not brought home to the passenger and assented to by him.⁶ There must be a contract, which is constituted only where the two parties mutually consent.⁷ And its interpretation should be strict against the carrier.⁸

§ 1161. **Redelivery to Passenger.** — When a journey is ended, the carrier is entitled to have the passenger receive his baggage; and, if he leaves it, the responsibility is transmuted to that of a warehouseman, and the liability remains only for negligence.⁹ If the passenger does not appear and claim the baggage, the higher responsibility of the carrier continues for a reasonable time, then the lower begins.¹⁰ What constitutes a reasonable time is a mixed question of law and fact, depending on the particular circumstances.¹¹ Some of the cases seem to hold that, on the termination of a railroad carriage at the place of the passenger's destination,

¹ *Smith v. North Carolina Rld.* 64 N. C. 235; *Sprague v. Missouri Pac. Ry.* 34 Kan. 347; *Brown v. Wabash, &c. Ry.* 18 Mo. Ap. 568; *Thompson v. Chicago, &c. Rld.* 22 Mo. Ap. 321; *The Bermuda*, 23 Blatch. 554; *Hirshberg v. Dinsmore*, 12 Daly, 429; *Capehart v. Seaboard, &c. Rld.* 77 N. C. 355; *Harvey v. Terre Haute, &c. Rld.* 74 Mo. 538; *Rice v. Kansas Pac. Ry.* 63 Mo. 314; *South and North Alabama Rld. v. Henlein*, 52 Ala. 606; *Illinois Cent. Rld. v. Morrison*, 19 Ill. 136; *Thayer v. St. Louis, &c. Rld.* 22 Ind. 26; *Fritzsche v. The Denmark*, 27 Fed. Rep. 141; *McCoy v. Erie, &c. Transp. Co.* 42 Md. 498; *Southern Express v. Caldwell*, 21 Wal. 264.

² *Chicago, &c. Rld. v. Simms*, 18 Bradw. 68; *Memphis, &c. Rld. v. Holloway*, 9 Baxter, 188; *Coward v. East Tennessee, &c. Rld.* 16 Lea, 225.

³ *Ante*, § 1072.

⁴ *Michigan Cent. Rld. v. Mineral Springs Manuf. Co.* 16 Wal. 318;

Southern Express v. Armstead, 50 Ala. 350.

⁵ *Mauritz v. New York, &c. Rld.* 23 Fed. Rep. 765.

⁶ *Henderson v. Stevenson*, Law Rep. 2 H. L. Sc. 470; *Rawson v. Pennsylvania Rld.* 48 N. Y. 212.

⁷ *Blossom v. Dodd*, 43 N. Y. 264; *Gott v. Dinsmore*, 111 Mass. 45, 52; *Southern Express v. Crook*, 44 Ala. 468; *Kirkland v. Dinsmore*, 62 N. Y. 171; *Wallace v. Matthews*, 39 Ga. 617. See *Steers v. Liverpool, &c. Steams. Co.* 57 N. Y. 1.

⁸ *Menzell v. Chicago, &c. Ry.* 1 Dil. 531; *St. Louis, &c. Ry. v. Smuck*, 49 Ind. 302.

⁹ *Mattison v. New York Cent. Rld.* 57 N. Y. 552.

¹⁰ *Chicago, &c. Rld. v. Boyce*, 73 Ill. 510; *Burnell v. New York Cent. &c. Rld.* 54 N. Y. 184; *Roth v. Buffalo, &c. Rld.* 34 N. Y. 548; *Holdridge v. Utica, &c. Rld.* 56 Barb. 191.

¹¹ *Louisville, &c. Rld. v. Mahan*, 8

the liability as common carriers ceases when the baggage is taken from the car and placed upon the platform. Various complicated facts have been passed upon by the courts, but it will suffice to add here references to a few cases.¹

§ 1162. *Sleeping and Palace Cars.* — In a previous chapter, we had a brief view of the relations of these cars, and of the road in whose trains they run, to the passenger.² It follows from the principles there stated, that the railroad proprietors are under the same responsibilities for baggage lost in a sleeping or palace car as in its own.³ It has been even laid down that no special bargaining between passenger and palace car proprietor can relieve the road of its liabilities. It "must," said Freeman, J. "respond to its obligations as a carrier of passengers, whether it carry on the sleeper of the Pullman Car Company, or in its own coaches provided by itself."⁴ Still it would seem that this view has not always been in the mind of the practising profession; for suits for the loss of baggage in these cars have been oftener brought against their proprietors, than against the road. And in these suits, the car-proprietors have generally been deemed neither common carriers nor hotel keepers, because not compellable to receive all applicants; yet they are held responsible for their negligence in the care of the traveller's effects.⁵

§ 1163. *The Doctrine of this Chapter restated.*

The common carrier's liability for baggage is in most respects the same as for ordinary freight. Yet the payment of

Bush, 184; Mote v. Chicago, &c. Rld. 27 Iowa, 22.

² Ante, § 1112-1114.

³ Kinsley v. Lake Shore, &c. Rld. 125 Mass. 54.

¹ Great Western Ry. v. Bunch, 13 Ap. Cas. 31; St. Louis, &c. Rld. v. Hardway, 17 Bradw. 321; Hodkinson v. London, &c. Ry. 14 Q. B. D. 228; Chicago, &c. Rld. v. Addizoat, 17 Bradw. 632; Chicago, &c. Rld. v. Fairclough, 52 Ill. 106; Bartholomew v. St. Louis, &c. Rld. 53 Ill. 227; Fairfax v. New York Cent. &c. Rld. 67 N. Y. 11; Atchison, &c. Rld. v. Brewer, 20 Kan. 669; Rome Rld. v. Wimberly, 75 Ga. 316; Patten v. Johnson, 131 Mass. 297.

⁴ Louisville, &c. Rld. v. Katzenberger, 16 Lea, 380, 386. See Illinois Cent. Rld. v. Handy, 63 Missis. 609.

⁵ Pullman Palace Car v. Smith, 73 Ill. 360; Woodruff Sleeping, &c. Coach v. Diehl, 84 Ind. 474; Lewis v. New York Sleeping Car, 143 Mass. 267; Scaling v. Pullman's Palace Car, 24 Mo. Ap. 29; Illinois Cent. Rld. v. Handy, supra; Whitney v. Pullman's Palace Car, 143 Mass. 243.

fare includes the transportation as well of the baggage as of the person. And the carrier is not compellable to take freight with the passenger, even though paid for it; he may have his separate freight trains or boats. If he is deceived, and something which is not baggage is passed off upon him as such, he is not responsible for its accidental loss. But if he knowingly consents to take as baggage what he might reject on the ground of its being freight, he is liable to the same extent as if he had no original power to decline. And it is the same if he accepts, with the passenger, freight for which he takes pay. He insures the baggage against all losses except from the acts of God and of the public enemy. Such is the common-law rule. And no contract between him and the passenger will free him from liability for losses from the negligence of himself and servants. But, by contract, he may make any other limitations of his liability which the court deems reasonable, not inconsistent with his general duties of public carrier.

CHAPTER XLIX.

HOTELS AND BOARDING-HOUSES.

§ 1164. Introduction.

1165-1181. Hotels or Inns.

1182. Boarding-houses.

1183. Doctrine of Chapter restated.

§ 1164. **How Chapter divided.** — We shall consider this subject as to, I. Hotels or Inns ; II. Boarding-houses.

I. *Hotels or Inns.*

§ 1165. **Defined.** — The old and common legal name for the habitation we are considering is “inn.”¹ In language less strictly professional, “hotel” is now more used. “Tavern,” a word declining in popularity, signifies substantially the same thing. If there are shades of difference in the popular meanings of these words, they are of no legal consequence. An inn, hotel, or tavern is a house for the general entertainment of all travellers and strangers applying, ready to make suitable compensation ; and it may be, or not, for the accommodation also of their horses and vehicles.²

§ 1166. **Analogous to Carrier.** — An innkeeper, therefore, is under a duty to the public, attended by correlate rights, both of which are analogous to the corresponding ones of the com-

¹ Jones v. Osborn, 2 Chit. 484.

² Bishop Stat. Crimes, § 297, and the places there cited. “A house where the traveller is furnished with everything which he has occasion for whilst upon his way.” Bayley, J. “A house, the owner of which holds out that he will receive all travellers and sojourners

who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received.” Best, J. Thompson v. Lacy, 3 B. & Ald. 283, 286, 287. And see Pinkerton v. Woodward, 33 Cal. 557.

mon carrier.¹ So we may find helpful illustrations in the last few chapters.² Yet there are minor differences in the holdings out and the services of these two classes of persons, rendering it not quite safe to rely implicitly on the analogies thus furnished. To descend to particulars, —

§ 1167. **License.** — From early times, in England and in most of our States, the licensing of innholders has been provided for by statutes. But the license does not make an innholder, nor does the absence of it prevent an innholder in fact from being such in law, or diminish his responsibilities.³

§ 1168. **Must receive Guest.** — An innkeeper, who has room, must receive all suitable applicants, even on Sunday.⁴ So that to decline, without reasonable excuse, to accept a traveller as a guest, or to withhold food and lodging from an accepted one, is indictable.⁵ *A fortiori*, it is actionable.⁶ But the guest must conform to the reasonable rules of the house; as, he cannot select any room he fancies, and insist on sitting up in it all night, when another suitable room is offered,⁷ or insist on taking a dog into rooms occupied by other guests.⁸ And the innkeeper may exclude “all disorderly persons” and “all persons who come with an intent to make an assault, or to insult him, or his customers.” Nor need he wait before acting until the assault or insult is given. But he cannot refuse accommodations to one because other persons of the same class have misbehaved.⁹ He is under no obligation to provide a room or other facilities for the carrying on of any trade or business.¹⁰

§ 1169. **Who Guest.** — To decline receiving an applicant as a guest is indictable only if he is a “traveller.”¹¹ And some-

¹ Ante, § 1058.

² Beginning at ante, § 1055.

³ Norcross v. Norcross, 53 Maine, 163; Atwater v. Sawyer, 76 Maine, 539.

⁴ Commonwealth v. Naylor, 10 Casey, Pa. 86; Hawthorn v. Hammond, 1 Car. & K. 404.

⁵ 1 Bishop Crim. Law, § 532; Reg. v. Rymer, 2 Q. B. D. 136; Rex v. Ivens, 7 Car. & P. 213.

⁶ White's Case, 2 Dyer, 158 b; Fell

v. Knight, 8 M. & W. 269; McCarthy v. Niskern, 22 Minn. 90.

⁷ Fell v. Knight, supra.

⁸ Reg. v. Rymer, supra.

⁹ Atwater v. Sawyer, supra, opinion by Emery, J. p. 541.

¹⁰ Mowers v. Fethers, 61 N. Y. 34; Fisher v. Kelsey, 121 U. S. 383; Myers v. Cottrill, 5 Bis. 465.

¹¹ 1 Bishop Crim. Law, § 532; Bishop Dir. & F. § 567.

thing like this must, in reason, be the rule in the civil action; for one at home, having his usual accommodations, would apparently not be legally injured¹ by being excluded from a not needed temporary bed and board, provided for people away from home. On the other hand, if the hotel keeper, not being defrauded, as a carrier is when merchandise which is subject to freight is passed off upon him as non-paying baggage, accepts as guest one whom he might refuse because not a traveller, the parties are, as between themselves, in respect of their resulting rights and duties, mutually estopped to deny that the relation between them is that of innkeeper and guest.² Such is the conclusion of legal reason; and, though the decided cases are not very distinct on the question, they appear to concede this view; or, at least, they are not as a whole adverse.³ Now, —

§ 1170. **Rule as to which.** — For the latter class of cases, the rule of the law appears to be, that a guest is any person whom, in the absence of fraud, the innkeeper receives into his inn, to provide for him on the basis of his being a traveller or transient person, whether in reality he is such or not. In a litigated case, this question will not be decided as of law from a single fact, but it will depend on all the facts combining; hence commonly, yet not necessarily in all circumstances, it will be for the jury, under instructions from the court.⁴ To illustrate, —

§ 1171. **Instances.** — If a man, not in travel, takes a strumpet to a neighboring hotel and puts up with her under the representation that she is his wife, he practises a fraud on the hotel proprietor by whom, if the facts were known, he would be excluded; for which reason, as well as because of the immorality of the transaction, he cannot, claiming the character of guest, recover of such proprietor the value of effects negligently lost in the hotel.⁵ And we have intimations that

¹ Ante, § 22, 26, 31.

² Ante, § 1154.

³ Compare *Walling v. Potter*, 35 Conn. 183; *Arcade Hotel v. Wiatt*, 44 Ohio State, 32; *Curtis v. Murphy*, 63 Wis. 4; *Gastenhof v. Clair*, 10 Daly,

265; *Lusk v. Belote*, 22 Minn. 468, and other cases cited to the next section.

⁴ *Hall v. Pike*, 100 Mass. 495; *Arcade Hotel v. Wiatt*, 44 Ohio State, 32.

⁵ *Curtis v. Murphy*, 63 Wis. 4.

the same result will follow if one solicits accommodations, not because he wants them, but simply to secure protection for his goods.¹ A man by carrying his baggage into a hotel, with no further step, does not become a guest;² but he may be such if accepted, though his stay is the briefest.³ A neighbor of the landlord, lodging at the hotel by his invitation, is not a guest;⁴ for he is not there in the capacity of a transient person. Nor are persons coming to an inn, on the keeper's invitation, for an evening's dance and supper, guests, though they pay.⁵ Nor yet is a permanent boarder a guest.⁶ But a special bargaining for the accommodations at a reduced rate does not alone deprive the traveller of this character.⁷ And the length of a sojourn at an inn is not absolutely controlling on this question.⁸

§ 1172. **Ceasing to be Guest.** — One who departs from a hotel with no intention of returning, or by the surrender of his room or otherwise severs his personal connection with it, ceases to be a guest though he leaves his baggage or other effects. Whereupon the innkeeper's responsibility for such baggage or effects is transmuted to that of an ordinary bailee.⁹ But a mere temporary absence, by one who does not relinquish his position as guest, does not have this effect.¹⁰ And in one case, perhaps not quite consistently with some others, we find it laid down that a departing guest whose baggage is by arrangement with the landlord to be sent after him, has for it the high protection due to a guest "for a reasonable

¹ *Arcade Hotel v. Wiatt*, 44 Ohio State, 32.

² *Strauss v. County Hotel, &c. Co.* 12 Q. B. D. 27; *Yorke v. Grenaugh*, 2 Ld. Raym. 866.

³ *Hodgson v. Nugent*, 5 T. R. 277; *Read v. Amidon*, 41 Vt. 15.

⁴ *Calve's Case*, 8 Co. 32 a.

⁵ *Fitch v. Casler*, 17 Hun, 126.

⁶ *Vance v. Throckmorton*, 5 Bush, 41; *Manning v. Wells*, 9 Humph. 746; *Johnson v. Reynolds*, 3 Kan. 257.

⁷ *Beale v. Posey*, 72 Ala. 323; *Pinkerton v. Woodward*, 33 Cal. 557; *Berkshire Woollen Co. v. Proctor*, 7 Cush.

417; *Shoecraft v. Bailey*, 25 Iowa, 553.

⁸ *Hancock v. Rand*, 94 N. Y. 1, 10, 17 Hun, 279.

⁹ *Miller v. Peeples*, 60 Missis. 819; *Murray v. Clarke*, 2 Daly, 102; *Whitemore v. Haroldson*, 2 Lea, 312; *Murray v. Marshall*, 9 Colo. 482; *Gelley v. Clerk*, Cro. Jac. 188; *Lawrence v. Howard*, 1 Utah, 142.

¹⁰ *Gelley v. Clerk*, supra; *McDonald v. Edgerton*, 5 Barb. 560; *Allen v. Smith*, 12 C. B. N. s. 638, 9 Jur. N. s. 230, 1284.

time, to be estimated according to the circumstances of the case.”¹ Concerning which protection,—

§ 1173. **Innkeeper as to Guest's Effects.** — As bridges and ferries constitute parts of a highway,² and the rights and liabilities of travellers are the same in respect of them as of the other parts; so inns are a part of the great system of public travel, and the rights and liabilities of the guests in respect of their keepers are, or should be, the same as in respect of those who carry them and their goods. Hence, in reason and by the better authorities, for the modern cases are a little discordant, the rule for the innkeeper is the same as that for the common carrier of goods and baggage;³ namely, he is an insurer of the safety of whatever baggage or other things he receives into his inn from the guest, whether in fact negligent in their keeping or not, except against the two overwhelming forces termed the acts of God and of the public enemy.⁴ For example, if they are stolen,⁵ or burned,⁶ without the fault either of the guest or of the landlord, the latter must pay for them. Contrary to which,—

§ 1174. **Untenable Doctrine.** — We have a few cases where in the landlord's responsibility is given an exceptional form, unique, and known in no analogous department of the law as respects goods and baggage. It is, that he is under the duty to exercise an extremely high care, yet not comprehending an insurance of their safety.⁷ A legislator might deem this rule better than the other, or he might prefer the other, without subjecting himself to special observation. But a judge or legal writer, whose very different duty it is to ascertain what

¹ *Adams v. Clem*, 41 Ga. 65, 67, opinion by Brown, C. J.

² *Ante*, § 952, 954.

³ *Ante*, § 1063, 1074, 1075, 1152.

⁴ *Richmond v. Smith*, 8 B. & C. 9 (Lord Tenterden, C. J. at p. 11, observing, “I think that the situation of the landlord was precisely analogous to that of a carrier”); *Kent v. Shuckard*, 2 B. & Ad. 803, 804 (“I cannot see any distinction in this respect between an innkeeper and a carrier”); *Morgan v. Ravey*, 6 H. & N. 265; *Norcross v.*

Norcross, 53 Maine, 163; *Mason v. Thompson*, 9 Pick. 280.

⁵ *Bennet v. Mellor*, 5 T. R. 273;

Filipowski v. Merryweather, 2 Fost. & F. 285; *Clute v. Wiggins*, 14 Johns. 175; *Bodwell v. Bragg*, 29 Iowa, 232.

⁶ *Hulett v. Swift*, 33 N. Y. 571; *Mowers v. Fethers*, 6 Lans. 112.

⁷ *Cutler v. Bonney*, 30 Mich. 259; *McDaniels v. Robinson*, 26 Vt. 316; *Merritt v. Claghorn*, 23 Vt. 177; *Dawson v. Chamney*, 5 Q. B. 164; *Vance v. Throckmorton*, 5 Bush, 41.

rule exists, instead of what ought to be, is required to search out and follow the reasoning of the law, and he is not permitted to travel on the line of the law-maker's reasoning. True, if he finds an unbroken series of adjudications contrary to the rule deduced by the law's reasoning, he must follow them, as constituting a technical exception. No one, examining our reports on this question, would deem the present instance to be of this sort. The common law has established, quite beyond cavil, a rule for the common carrier of goods and baggage, the reason of which applies equally to the keeper of a common hotel or inn; and, so long as the law is a system of reason, this rule binds the courts until legislation has spoken otherwise.¹

¹ And see the excellent elucidation of this question by Porter, J. in *Hulett v. Swift*, 33 N. Y. 571. This case is significant as calling to our attention the office of the civil law in expositions of our own. The learned judge refers to Story on Bailments, § 472, as one of the sources of the modern misleading. Now, —

Doctrines derived from the Civil Law. — Our common law has many doctrines traceable to the civil law. That system of jurisprudence being, equally with our own, a practical incarnation into human form of the natural and fundamental right common to all mankind, by a civilized people for the use of associated men, the two systems, if built up in a manner worthy of respect, could not be otherwise than reasonably fair likenesses of each other. And investigators into the sources of the younger system, not always bearing this truth in mind, will, as of course, concede more of motherhood to the older than is due. Still our jurisprudence is a good deal indebted to the civil law, just as our English language is to the Latin. But a Latin word, introduced into the English, takes on new meanings and casts off old ones; so that a study of its Latin origin affords but slight help to its English use. And it is precisely so with a

principle which the common-law jurisprudence has adopted from the civil law; and the civil-law learning may lead us into error concerning it. Thus, in the matter before us, Story, in his "Bailments," sets out what he understands to be the civil-law doctrine, states that our law on the subject is derived from the civil law, then by a natural process announces the civil-law rule as being that of the common law. I do not object to the study of comparative jurisprudence. It is both interesting and instructive. And illustrations of our common law from the civil are, at least, ornamental. Like ornament in other things, they are liable to mislead in moments when caution is asleep. There was a time when English lawyers were too much inclined to despise the civil law. Now, when codification is becoming fashionable in England, and English lawyers are beginning to despise their mother the common law, and are devising means to degrade and then to murder her, they turn with reverence to the old system which is supposed to have the word "Code" in it. So much comes from a name. Looking beyond the name, we discover that the civil law is a system built up, not by codifiers, but by jurists. The name "Code" originated in the act of

§ 1175. **Guest's Contributory Negligence.** — We have seen that, though the common-law carrier insures the safety of the passenger's baggage and goods as just explained, still, if harm comes to them through the passenger's negligence combining with the carrier's, such contributory negligence will defeat a suit for the damages.¹ This doctrine has a yet more frequent application in the cases we are now considering; because, of necessity, the guest has a sort of joint possession with the innkeeper, more or less approaching the exclusive. And the rule is, that, if his negligence has contributed to a loss, which equally or even principally is attributable to the innkeeper's fault, the latter may have the protection of the ordinary law of contributory negligence,² whereby he will be relieved from responsibility.³

§ 1176. **What Effects.** — There are cases which seem to hold that the innkeeper's responsibility extends only to "baggage," as explained in the last chapter,⁴ not including other valuables.⁵ But the explanations of the last chapter also show, that the carrier's liability covers as well merchandise as baggage, except where that for which he is entitled to charge freight is fraudulently passed off upon him as non-paying baggage. Now, in the relation of innkeeper and guest, there

destroying all jurist works except some selected ones, and making it a punishable forgery for any man afterward to be a jurist. To be consistent, therefore, the present English worshippers of the civil law should, instead of advocating their codification schemes, labor to establish a line of jurists of the common law; and persuade Parliament to cease its petty codifications of selected subjects, wherein are petrified conglomerations of good and bad deductions from the common law's reasonings into poor statutory stone, for practitioners and judges to peck and quarrel over, instead of employing themselves in any sort of reasoning. See, for example, ante, § 689 and note; post, § 1310-1314.

¹ Ante, § 1159.

² Ante, § 458-470.

³ *Cashill v. Wright*, 6 Ellis & B.

891; *Walsh v. Porterfield*, 6 Norris, Pa. 376; *Elcox v. Hill*, 98 U. S. 218; *Clary v. Willey*, 49 Vt. 55; *Bohler v. Owens*, 60 Ga. 185; *Howe Machine Co. v. Pease*, 49 Vt. 477; *Burgess v. Clements*, 4 M. & S. 306; *Armistead v. Wilde*, 17 Q. B. 261; *Filipowski v. Merryweather*, 2 Fost. & F. 285; *Chamberlain v. Masterson*, 26 Ala. 371; *Hadley v. Upshaw*, 27 Texas, 547; *Profflet v. Hall*, 14 La. An. 524; *Kelsey v. Berry*, 42 Ill. 469; *Hawley v. Smith*, 25 Wend. 642; *Murchison v. Sergeant*, 69 Ga. 206; *Classen v. Leopold*, 2 Sweeny, 705; *Oppenheim v. White Lion Hotel*, Law Rep. 6 C. P. 515.

⁴ Ante, § 1154-1156.

⁵ *Pettigrew v. Barnum*, 11 Md. 434; *Giles v. Fauntleroy*, 13 Md. 126; *Treiber v. Burrows*, 27 Md. 130.

is ordinarily no scope for this distinction; because, if the guest's trunk contains merchandise, there is no separate hotel charge for it, as there is a separate carrier's charge. The result of which reasoning is, that commonly the innkeeper's responsibility extends to whatever the guest has with him, whether baggage or merchandise.¹ Yet, if the innkeeper permits the guest to occupy a room for business purposes,² or to carry on merchandising in his lodging room, this is a transaction outside of the relation of innkeeper and guest, and the responsibility we are considering does not attach to goods therein.³

§ 1177. **Possession.** — The innkeeper, to be responsible for the guest's goods, must have an actual or constructive possession of them. This rule is commonly satisfied by their being simply within his house; they need not be put literally into his hands, or into the hands of his servant.⁴ And, as explained in the last chapter in respect of railroad baggage,⁵ the guest's possession does not necessarily exclude the landlord's; so that the latter may be responsible for the loss of what the former retains about his person.⁶ But if the guest chooses to retain that exclusive control and custody which exclude the landlord's, he cannot have compensation for a loss.⁷ And it is the same if he intrusts his effects — for example, money — to a fellow-guest, in whom he reposes confidence.⁸

§ 1178. **Horses and Carriages,** — not being things cared for within the inn, are sufficiently delivered when intrusted to a servant out of doors.⁹

§ 1179. **Statutory Modifications.** — The foregoing rules of

¹ *Berkshire Woollen Co. v. Proctor*, 7 Cush. 417, 426, 427; *Kent v. Shuckard*, 2 B. & Ad. 803; *Needles v. Howard*, 1 E. D. Smith, 54; *Beedle v. Morris*, Cro. Jac. 224; *Wilkins v. Earle*, 44 N. Y. 172; *Kellogg v. Sweeney*, 1 Lans. 397; *Threfall v. Borwick*, Law Rep. 7 Q. B. 711, 10 Q. B. 210.

² Ante, § 1168.

³ *Fisher v. Kelsey*, 121 U. S. 383; 41. *Myers v. Cottrill*, 5 Bis. 465; *Farnworth v. Packwood*, 1 Stark. 249.

⁴ *Calye's Case*, 8 Co. 32 a; *Norcross v. Norcross*, 53 Maine, 163; *Rockwell v. Proctor*, 39 Ga. 105; *Bennet v. Mellor*, 5 T. R. 273; *Rubenstein v. Cruikshanks*, 54 Mich. 199; *Candy v. Spencer*, 3 Fost. & F. 306.

⁵ Ante, § 1159.

⁶ *Jalie v. Cardinal*, 35 Wis. 118.

⁷ *Vance v. Throckmorton*, 5 Bush,

⁸ *Houser v. Tully*, 12 Smith, Pa. 92.

⁹ *Jones v. Tyler*, 1 A. & E. 522.

liability are in many of our States more or less modified by statutes. But as the reader will have before him those of his own State, and the decisions upon them, it is not necessary to enter here into this part of the subject.¹

§ 1180. **Custody not as Innkeeper.**— We have seen² that, when a guest has severed his personal connection with the inn, the innkeeper's responsibility for effects left behind is reduced to that of an ordinary bailee. And it is the same where one not a guest deposits a thing with him.³

§ 1181. **Lien.**— The innkeeper may retain possession of the guest's goods to enforce pay for his entertainment;⁴ even though, he having them lawfully with him,⁵ they are the property of a third person.⁶ For example, the lien was enforced against the true owner of a hired piano, which the guest brought to the hotel.⁷ But it is otherwise where the inn-

¹ Some of the cases are *Fisher v. Kelsey*, 121 U. S. 383; *Faucett v. Nichols*, 64 N. Y. 377; *Olson v. Crossman*, 31 Minn. 222; *Stewart v. Head*, 70 Ga. 449; *Stewart v. Parsons*, 24 Wis. 241; *Fuller v. Coats*, 18 Ohio State, 343; *Hyatt v. Taylor*, 42 N. Y. 253; *Ramaley v. Leland*, 43 N. Y. 539; *Bendetson v. French*, 46 N. Y. 266; *Rosenplaenter v. Roessle*, 54 N. Y. 262; *Krohn v. Sweeney*, 2 Daly, 200; *Beale v. Posey*, 72 Ala. 323; *Lanier v. Youngblood*, 73 Ala. 587; *Becker v. Haynes*, 29 Fed. Rep. 441; *Spring v. Hager*, 145 Mass. 186; *Noble v. Milliken*, 77 Maine, 359; *Burbank v. Chapin*, 140 Mass. 123.

² Ante, § 1172.

³ *Arcade Hotel v. Wiatt*, 44 Ohio State, 32; *Healey v. Gray*, 68 Maine, 489; *Broadwater v. Blot*, Holt N. P. 547.

⁴ *Thompson v. Lacy*, 3 B. & Ald. 283; *Pollock v. Landis*, 36 Iowa, 651; *Gammell v. Schley*, 41 Ga. 112; *Dunlap v. Thorne*, 1 Rich. 213; *Hursh v. Byers*, 29 Mo. 469.

⁵ Possibly this qualification is not admissible, but probably it is. In *Yorke v. Grenagh*, 2 Ld. Raym. 866, the court is reported to have said: "Sup-

posing that this traveller was a robber, and had stolen this horse; yet, if he comes to an inn and is a guest there, and delivers the horse to the innkeeper who does not know it, the innkeeper is obliged to accept the horse, and then it is very reasonable that he shall have a remedy for payment, which is by retainer. And he is not obliged to consider who is owner of the horse." And then follows a discussion as to whether or not an innocent carrier of stolen goods has a lien on them for the carriage. The latter question has in some American cases been decided against the carrier; and, it seems to me, rightly. *Robinson v. Baker*, 5 Cush. 137; *Fitch v. Newberry*, 1 Doug. Mich. 1. See, particularly, the opinion of Fletcher, J. in the former case. In the supposed case of a thief putting up at an inn with his stolen horse, the innkeeper, ignorant of the facts, might suppose himself obliged to receive him. In truth, he was under no such obligation, and if the receiving had been with knowledge, he would have been even indictable.

⁶ *Proctor v. Nicholson*, 7 Car. & P. 67; *Manning v. Hollenbeck*, 27 Wis. 202; *Snead v. Watkins*, 1 C. B. N. s. 267.

⁷ *Threfall v. Borwick*, Law Rep. 7

keeper knows the thing not to belong to the guest.¹ This lien, like any other, may be waived;² but a mere taking of security is not a waiver.³ We have some statutes concerning it.⁴ An exemption of the guest's property from attachment does not prevent the lien from adhering.⁵ It does not extend to the guest's person, and especially the innkeeper cannot strip the clothes from him.⁶

II. *Boarding-houses.*

§ 1182. **General.** — The rights and liabilities of innkeepers do not, at the common law, extend to the proprietors of boarding-houses, or to innkeepers in respect of mere boarders.⁷ But we have statutes, in various terms, giving the lien to boarding-house keepers in circumstances which they point out.⁸ A boarder is not under the necessities of a traveller; therefore, at the common law, bargainings by him for board stand on the footing of ordinary contracts.

§ 1183. *The Doctrine of this Chapter restated.*

Hotel keepers and common carriers, as to both persons and property, are *quasi* public officers. They supply, for the general good, an indispensable conveyance of persons and their effects; with the needful resting places on the way, and the refreshments. Hence, on the one hand, those who have undertaken this office must fulfil it, and, on the other, they may justly claim to have their compensation made secure.

Q. B. 711, 10 Q. B. 210; *Cook v. Kane*, 13 Oregon, 482.

¹ *Broadwood v. Granara*, 10 Exch. 417.

² *Mulliner v. Florence*, 3 Q. B. D. 484. See *Manning v. Hollenbeck*, *supra*; *Grinnell v. Cook*, 3 Hill, N. Y. 485, 492.

³ *Angus v. McLachlan*, 23 Ch. D. 330.

⁴ *Domestic Sewing Machine Co. v. Watters*, 50 Ga. 573; *Coates v. Ache-*

son, 23 Mo. Ap. 255; *Wyckoff v. Southern Hotel*, 24 Mo. Ap. 382.

⁵ *Swan v. Bournes*, 47 Iowa, 501.

⁶ *Sunbolf v. Alford*, 3 M. & W. 248.

⁷ *Pollock v. Landis*, 36 Iowa, 651.

⁸ *Misch v. O'Hara*, 9 Daly, 361; *Mills v. Shirley*, 110 Mass. 158; *Smith v. Colcord*, 115 Mass. 70; *Cady v. McDowell*, 1 Lans. 484; *Nichols v. Halliday*, 27 Wis. 406; *Brooks v. Harrison*, 41 Conn. 184; *McIlvane v. Hilton*, 7 Hun, 594.

On this basis, the law of this double subject of common carriers and innkeepers proceeds. It has various distinctions, but all grow out of the differences in the different sorts of case. The innkeeper is under the duty to receive the guest, and to keep him and especially his effects safely. He is, therefore, entitled to be paid; and, to enforce payment, the law gives him a lien, not on the person but on the baggage and other goods of the guest. He cannot know that the guest, with whom he deals under compulsion, is responsible; but he can compute the value of the goods. Hence the lien covers whatever the guest has lawfully with him; and, though it should not in truth be his, the innkeeper's claim supersedes all other ownership.

CHAPTER L.

SENDING PARCELS.

§ 1184. **Already**, — in the late preceding chapters, and especially in the last two, we have had a view of the leading principles which govern this one. And —

§ 1185. **The Rule** — for the present subject is, that express companies and all other companies and individuals, whose business is the carrying for pay of all parcels offered, are in law common carriers of goods,¹ with the rights and duties which pertain alike to all classes of such carriers;² so that, for example, in the absence of any statute or contract varying their obligations, they are insurers of the safety and the safe carriage, within a reasonable time, of the parcels, except as against the two overwhelming forces known as the acts of God and of the public enemy.³

§ 1186. **What the Delivery.** — A common carrier is required to deliver the goods which he has carried.⁴ And whether the delivery shall be at the consignee's dwelling-house, at his place of business, on a wharf, at the carrier's depot, with or without notice to the consignee, or how otherwise, depends on

¹ Ante, § 1057.

² Ante, § 1151-1153.

³ *Ingate v. Christie*, 3 Car. & K. 61; *Taylor v. Great Northern Ry.* Law Rep. 1 C. P. 385; *Southern Express v. Crook*, 44 Ala. 468; *McMahon v. Macy*, 51 N. Y. 155; *Christenson v. American Express*, 15 Minn. 270; *Southern Express v. Newby*, 36 Ga. 635; *Stadhecker v. Combs*, 9 Rich. 193; *United States Express v. Rush*, 24 Ind. 403; *Richards v. Westcott*, 2 Bosw. 589; *United States Express v. Backman*, 28 Ohio State,

144; *Michigan Cent. Rld. v. Curtis*, 80 Ill. 324; *Upshare v. Aided*, 1 Comyns, 25; *Parmelee v. Lowitz*, 74 Ill. 116; *Palmer v. Grand Junction Ry.* 4 M. & W. 749, 766, 768; *Bland v. Adams Express*, 1 Duv. 232; *Neal v. Saunderson*, 2 Sm. & M. 572; *Day v. Ridley*, 16 Vt. 48.

⁴ *American Express v. Baldwin*, 26 Ill. 504; *Scholes v. Ackerland*, 15 Ill. 474; *Gibson v. Culver*, 17 Wend. 305; *Brown v. Hodgson*, 4 Taunt. 189; *Bodenham v. Bennett*, 4 Price, 31.

the nature and mode of the carriage, the sort of thing, the usages of the business, and the particular contract of carriage.¹ Parcels, conveyed by expressmen and other carriers of the like sort, are commonly to be delivered at the house or place of business of the consignee, according to the nature of the particular case, and the form of the address.²

§ 1187. **Receiving Parcel — Delivery Impracticable.** — The consignee's duty to receive a parcel is concurrent with that of the carrier to deliver it to him. And if, because of the former's absence, or because after due searching he cannot be found, or any other like impediment, a delivery cannot be made, the latter's special responsibility terminates. Yet, having the parcel, he must take the care of it due from a warehouseman.³

§ 1188. **Disclosing to Carrier.** — The rule exempting the carrier of passengers from responsibility for the safety of merchandise for which he is entitled to be paid, when passed off upon him as non-paying baggage,⁴ has no application to a passenger's trunk when taken by an expressman to a hotel. It is treated as merchandise, its particular contents are of no consequence, and, whatever they are, the expressman is liable if it is lost.⁵ And where any common carrier of merchandise who has given no notice that his prices will vary with the value of a package, desires to know its value, he must ask; in the absence of which asking or notice, he is not defrauded by the consignor's mere omission to mention the value, how-

¹ The *Peytona*, 2 Curt. C. C. 21; *Rowland v. Miln*, 2 Hilton, 150; *The Sultana v. Chapman*, 5 Wis. 454; *Golden v. Manning*, 2 W. Bl. 916; *Stephenson v. Hart*, 4 Bing. 476; *Farmers & Mech. Bank v. Champlain Transp. Co.* 23 Vt. 186, 209; *Cope v. Cordova*, 1 Rawle, 203; *Ostrander v. Brown*, 15 Johns. 39; *Garside v. Trent, &c. Nav.* 4 T. R. 581; *Price v. Powell*, 3 Comst. 322; *Norway Plains Co. v. Boston, &c. Rld.* 1 Gray, 263; *Dean v. Vaccaro*, 2 Head, 488; *Bansemer v. Toledo, &c. Ry.* 25 Ind. 434.

² *American Merchants Union Exp. v. Wolf*, 79 Ill. 430; *Southern Express*

v. Armstead, 50 Ala. 350; *Duff v. Budd*, 3 Brod. & B. 177, 181; *Marshall v. Wells*, 7 Wis. 1; *Sullivan v. Thompson*, 99 Mass. 259; *American Union Express v. Robinson*, 22 Smith, Pa. 274; *Henshaw v. Rowland*, 54 N. Y. 242.

³ *Ante*, § 1161; *Adams Express v. Darnell*, 31 Ind. 20; *Duff v. Budd*, 3 Brod. & B. 177; *American Express v. Hockett*, 30 Ind. 250; *Roth v. Buffalo, &c. Rld.* 34 N. Y. 548; *Indianapolis, &c. Rld. v. Herndon*, 81 Ill. 143.

⁴ *Ante*, § 1155.

⁵ *Parmelee v. Lowitz*, 74 Ill. 116.

ever great it may be.¹ Therefore his liability is complete and unimpaired. But any misleading appearance of the package, any non-communication of what it is important for the carrier to know, any fraud in law or in fact practised upon him relating to it, therefore any non-communication of a value which the consignor ought to disclose, will exempt the carrier from his high responsibility.²

§ 1189. **Gratuitous.**—One, whether a common carrier or not, who undertakes to carry a package without reward, is in law a gratuitous bailee; so is liable only for losses from gross negligence.³

§ 1190. **C. O. D.**—This mark on a package⁴ does not alone charge the carrier with the duty to collect its value on delivery; there must be proof of a further understanding, or of a usage, to this effect.⁵ But the undertaking to collect, properly shown, binds the carrier—the consequences whereof will be obvious without special explanation.⁶

§ 1191. **Limiting Liability.**—By the commonly accepted doctrine, the carrier cannot, by any notice or bargaining, exempt himself from liability for his negligence.⁷ But, as to most other particulars of his common-law duty, a distinct and mutually understood agreement, not a mere notice of which the party employing him has no knowledge or to which he does not in fact assent, will, to the extent deemed by the court reasonable and just, be effectual.⁸

¹ *Baldwin v. Liverpool, &c. Steams.* 74 N. Y. 125; *Merchants Desp. Transp. Co. v. Bolles*, 80 Ill. 473.

² *Bastard v. Bastard*, 2 Show. 81 and note; *Titchburne v. White*, 1 Stra. 145; *Gibbon v. Paynton*, 4 Bur. 2298, 2300; *Tyly v. Morrice*, Carth. 485; *Hayes v. Wells*, 23 Cal. 185; *Warner v. Western Transp. Co.* 5 Rob. N. Y. 490; *American Express v. Perkins*, 42 Ill. 458; *Oppenheimer v. United States Express*, 69 Ill. 62. And see *United States Express v. Root*, 47 Mich. 231.

³ *Beauchamp v. Powley*, 1 Moody & R. 38; *Kirtland v. Montgomery*, 1 Swan, Tenn. 452; *Adams Express v.*

Cressap, 6 Bush, 572; *Upshare v. Aidee*, 1 Comyns, 25.

⁴ *Bishop Con.* § 377.

⁵ *Chicago, &c. Ry. v. Merrill*, 48 Ill. 425; *American Merchants Union Exp. v. Wolf*, 79 Ill. 430.

⁶ *Meyer v. Lemcke*, 31 Ind. 208; *Murray v. Warner*, 55 N. H. 546; *Herrick v. Gallagher*, 60 Barb. 566.

⁷ *Ante*, § 1075, 1160; *Kirby v. Adams Express*, 2 Mo. Ap. 369; *Orndorff v. Adams Express*, 3 Bush, 194.

⁸ *Ante*, § 1160; *American Express v. Spellman*, 90 Ill. 455; *Southern Express v. Hunnicutt*, 54 Missis. 566; *Porter v. Southern Express*, 4 S. C. 135;

§ 1192. *Lien.* — The expressman, or any other common carrier, has a lien on the goods for their carriage.¹

§ 1193. *The Doctrine of this Chapter restated.*

The subject of this chapter is parcel of the wider law of common carriers. Therefore, in its leading principles, it is within elucidations which have occupied us all the way since the opening of the chapter on "Travelling by Rail." Any public carrier of parcels for all persons is a common carrier, and the law of common carriers applies to him in all respects. A further repetition of the particulars is not deemed necessary.

Reed v. United States Express, 48 N. Y. Express, 63 Mo. 376 ; Brehme v. Adams
462 ; Blossom v. Dodd, 43 N. Y. 264 ; Express, 25 Md. 328.
Magnin v. Dinsmore, 56 N. Y. 168 ; ¹ Ante, § 1181 ; United States Ex-
Hopkins v. Westcott, 6 Blatch. 64 ; press v. Haines, 67 Ill. 137 ; Langwor-
American Express v. Second Nat. Bank, thy v. New York, &c. Rld. 2 E. D. Smith,
19 Smith, Pa. 394 ; Snider v. Adams 195 ; Adams v. Clark, 9 Cush. 215.

CHAPTER LI.

MAIL, TELEGRAPH, AND TELEPHONE COMMUNICATION.

§ 1194. Introduction.

1195-1202. Communication by Mail.

1203-1212. By Telegraph.

1213. By Telephone.

1214. Doctrine of Chapter restated.

§ 1194. **How Chapter divided.** — We shall consider this subject as to I. Communication by Mail; II. By Telegraph; III. By Telephone.

I. *Communication by Mail.*

§ 1195. **Whether Common Carrier.** — Carriage through the mails is a function of the government of the United States, provided for in our National Constitution, and executed by public officers called postmasters. Congress, by statutes, regulates the service, and fixes its bounds.¹ It is plain, therefore, that if carriage by mail is to be regarded as done by a common carrier, the government is the carrier. Thereupon, not only could not such carrier be sued,² but there is no principle in our law justifying a court in casting upon the sovereign power the sort of obligation under which a common carrier acts.

§ 1196. **Postmaster.** — A postmaster, then, is an officer of the government,³ and not a common carrier. As such officer, his rights and liabilities are within the explanations of a preceding chapter.⁴ Thus, —

¹ Ex parte Jackson, 96 U. S. 727 ;
United States v. Vilas, 124 U. S. 86.

² Ante, § 749.

³ Keenan v. Southworth, 110 Mass.
474 ; United States v. Eddy, 1 Bis. 227.

⁴ Ante, § 770-798.

§ 1197. **Forwarding Letter.** — If a letter or other mailable matter is deposited in the post-office, the postmaster is under the legal duty, a neglect whereof is actionable by a person injured,¹ to forward it to the one to whom it is addressed.² And, within the same reason, where a man delivered to a post-office clerk a letter with money in it, to be sent as a registered letter, both supposing it could be so, then the clerk learned that it could not be registered, but by direction of his superior forwarded it as an ordinary letter, whereupon it was lost, the two officials were held to be jointly answerable to the owner.³ So, —

§ 1198. **Delivering.** — For the same reason, a postmaster who declines to deliver a letter, newspaper, or other mail-matter to the person to whom it is addressed, is liable for the resulting damages.⁴ As to —

§ 1199. **Under Officers — Clerks.** — By law, “all persons employed in the postal service” must take a prescribed oath of office.⁵ So that the clerks and other subordinates, duly sworn, are legally regarded as “public officers, each of whom is responsible for his own negligence only, and not for that of any of the others, although selected by him, and subject to his orders.”⁶ Therefore a postmaster’s liability for the negligence of his sworn assistants can result only “from his own neglect in not properly superintending the discharge of their duties in his office.”⁷ Now, —

§ 1200. **Negligent or Careful.** — By the general law for official persons, one doing a ministerial act is answerable to an individual injured through any negligence therein, but not for

¹ Ante, § 22, 26, 132, 796.

² *Dunlop v. Munroe*, 7 Cranch, 242.

³ *Fitzgerald v. Burrill*, 106 Mass. 446.

⁴ *Teal v. Felton*, 12 How. U. S. 284; s. c. in State court, nom. *Teall v. Felton*, 1 Comst. 537; *Edwards v. Dickenson*, 12 Mod. 6; *Rowning v. Goodchild*, 2 W. Bl. 906; *Smith v. Powdich*, Cowp. 182; *Stock v. Harris*, 5 Bur. 2709; *Nevius v. Bank of Lansingburgh*, 10 Mich. 547.

⁵ U. S. Stat. 1874, c. 46.

⁶ Gray, C. J. in *Keenan v. Southworth*, 110 Mass. 474, referring to *Lane v. Cotton*, 1 Id. Raym. 646, 12 Mod. 472; *Whitfield v. Le Despencer*, Cowp. 754; *Dunlop v. Munroe*, 7 Cranch, 242; *Schroyer v. Lynch*, 8 Watts, 453; *Bishop v. Williamson*, 2 Fairf. 495; *Hutchins v. Brackett*, 2 Fost. N. H. 252.

⁷ *Johnson, J. in Dunlop v. Munroe*, supra, at p. 269.

an injury from the non-negligent performance of an official duty.¹ Within which principle, combined with the doctrine of the last section, a postmaster who discharges his own official functions with due care, is not responsible for the loss of a letter with its inclosure, or of any other package in the mail, or in passing through the hands of his under officers.² And it is the same where a subordinate steals money from a letter.³ But for any loss through his personal negligence he must make reparation.⁴ Also, —

§ 1201. **Servant.** — The postmaster is responsible for the acts of any unsworn person — not, therefore, a fellow-officer⁵ — whom he admits to any service about the mails.⁶

§ 1202. **Privacy.** — A letter or other sealed package, paying letter postage, is, in the post-office and mails, under the same protection of the law as private papers in one's dwelling-house. Neither an officer in the mail service, nor any private person other than the one to whom it is addressed, nor any officer of the law, without a warrant under oath, may open it, even for the purpose of detecting crime.⁷ In England, one cannot reclaim a letter which he has deposited in the post-office; but in France he may, at any time before it is despatched.⁸

II. *By Telegraph.*

§ 1203. **Compared with Mail.** — Our telegraphic service is not, like that of the mails, governmental. And it is conducted, not by official persons, but by servants of the proprietors of the respective lines. So that the doctrines of this sub-title and of the last are quite distinct.

¹ Ante, § 750, 771, 789, 791, 796.

² Lane v. Cotton, 11 Mod. 12, 5 Mod. 456, 12 Mod. 472, 1 Salk. 17, 1 Ld. Raym. 646; Keenan v. Southworth, 110 Mass. 474; Whitfield v. Le Despencer, Cowp. 754. See Hordern v. Dalton, 1 Car. & P. 181; Bolan v. Williamson, 1 Brev. 181.

³ Whitfield v. Le Despencer, supra; Franklin v. Low, 1 Johns. 396; Schroyer v. Lynch, 8 Watts, 453; Bolan v. Williamson, 2 Bay, 551.

⁴ Maxwell v. McIlvoy, 2 Bibb, 211; Christy v. Smith, 23 Vt. 663. See Danforth v. Grant, 14 Vt. 283.

⁵ Ante, § 1199.

⁶ Bishop v. Williamson, 2 Fairf. 495. And see Sawyer v. Corse, 17 Grat. 230.

⁷ Ex parte Jackson, 96 U. S. 727; United States v. Eddy, 1 Bis. 227.

⁸ Ex parte Cote, Law Rep. 9 Ch. Ap. 27.

§ 1204. **Differences — Statutes.** — We have many statutes, the terms of which more or less differ, regulating our telegraph companies and their business. Besides which, our judicial decisions of questions not depending on statutory expressions are not altogether harmonious. The result whereof is an admonition to the practitioner to look carefully into the particular statutes and adjudications of his own State; while, in the nature of this sort of thing, such elucidations as can be given here will seem not absolutely complete.

§ 1205. **Duty.** — Whether we look at this subject in the light of the common law, or of it and the statutes combined, the result is, that a telegraph company, by virtue of its holding out,¹ is under the duty to accept and with reasonable promptness transmit, at uniform and reasonable rates, all offered messages within the capacity of its service, — a duty in some of the States more precisely defined and specially enforced by statutes.² Some particular questions are —

§ 1206. **Nature of Liability — (Common Carrier — Bailee).** — It has been both affirmed and denied that telegraph companies are common carriers of the messages intrusted to them. And it has sometimes been assumed that, if they are such, they are, therefore, insurers of their transmission, within a reasonable time, and of the accuracy of the words sent, as against all casualties except the acts of God and of the public enemy. In this sense, it is sufficiently settled by adjudication, and it is plain in reason, that they are not common carriers. A message needs to be manipulated and copied, as a package of goods does not. The carrier of goods forwards the exact thing given him; the transmitter of a message sends

¹ Ante, § 1057-1062.

² Bartlett v. Western Union Tel. 62 Maine, 209, 221; Western Union Tel. v. Ferguson, 57 Ind. 495; Western Union Tel. v. Fatman, 73 Ga. 285; Little Rock, &c. Tel. v. Davis, 41 Ark. 79; Western Union Tel. v. Buchanan, 35 Ind. 429; Western Union Tel. v. Hamilton, 50 Ind. 181; Grinnell v. Western Union Tel. 113 Mass. 299; Western Union Tel. v. Pendleton, 95

Ind. 12; Western Union Tel. v. Brown, 108 Ind. 538; Western Union Tel. v. Steele, 108 Ind. 163; Western Union Tel. v. Kinney, 106 Ind. 468; Western Union Tel. v. Mossler, 95 Ind. 29; Western Union Tel. v. Meredith, 95 Ind. 93; Western Union Tel. v. Reed, 96 Ind. 195; Western Union Tel. v. Harding, 103 Ind. 505; Ellis v. American Tel. 13 Allen, 226.

a copy — what he deems to be its likeness. In operating the electric machinery, skill is required, unlike what takes place in putting a box of goods upon a freight car. The thing contracted for is a mechanical result. So that the rule in the common carriage of freight does not apply. And especially is the suggestion, sometimes met with, that the telegraph company is a bailee, unfounded. A bailee is to pass along, or deliver back, the exact unaltered thing put into his hands;¹ while the telegraph company keeps the thing, and sends to its destination a substitute. But there are common carriers of things not merchandise, and their responsibilities vary with the thing. Thus, the common carrier of passengers is not an insurer, he is responsible only for due care.² And, in reason, comparing the position of the telegraph company with that of the common carrier, such company is a common carrier, not of goods, not of passengers, not of cattle, but of words, delivered to him to be transmitted in copy. Casualties beyond his control, liable to come from the condition of the atmosphere, from a latent defect in the machinery, or from some not to be anticipated lack of perfection in the transmitting servant, may result in an imperfect performance, and he does not guarantee perfection. But his guaranty and responsibility hold him and his servants to the degree of carefulness³ which ascends and descends with the greater or less magnitude of the interest involved and of the ill consequences of a miscarriage. Within which rule, the carefulness required of him will necessarily a good deal vary with the circumstances. And such is believed to be the result, not of a single decision, but of the adjudications and utterances of the courts viewed as a whole.⁴ Thus, —

¹ Bishop Stat. Crimes, § 423.

² Ante, § 1063, 1064.

³ Ante, § 1064 ; post, § 1209.

⁴ Consult and compare, among other cases, *Leonard v. New York, &c. Tel.* 41 N. Y. 544 ; *Rittenhouse v. Independent Line of Tel.* 44 N. Y. 263 ; *Baldwin v. United States Tel.* 45 N. Y. 744 ; *Pinckney v. Western Union Tel.* 19 S. C. 71 ; *Bartlett v. Western Un-*

ion Tel. 62 Maine, 209 ; *La Grange v. Southwestern Tel.* 25 La. An. 383 ; *Marr v. Western Union Tel.* 85 Tenn. 529 ; *Western Union Tel. v. Meek*, 49 Ind. 53 ; *Western Union Tel. v. Cohen*, 73 Ga. 522 ; *Pennington v. Western Union Tel.* 67 Iowa, 631 ; *Womack v. Western Union Tel.* 58 Texas, 176 ; *Abraham v. Western Union Tel.* 23 Fed. Rep. 315 ; *Western Union Tel. v.*

§ 1207. **Transmission — Promptness.** — A telegraph company, if it fails to transmit a message, or to do it with reasonable promptness, is, unless excused by having employed due carefulness, or for some other good cause, answerable in damages to a party injured.¹ And the sender's contributory negligence, as in other classes of cases,² will defeat his claim; for example, it was so where the delay was caused by a too indefinite address, which, though the company called his attention to it, he did not rectify.³ So likewise, if the person addressed is a guest in a hotel, the company will not be responsible for the hotel clerk's delay in passing it to him.⁴ Again, —

§ 1208. **Repeating.** — Our telegraph companies commonly notify their patrons, and ordinarily by a condition printed on the blanks upon which messages are to be written, that, to secure accuracy, each important message should be repeated, — that is, transmitted back from the station of its destination, to be verified by the original, — for which service an additional compensation is charged.⁵ It is plain in reason, and quite in accord with the current of the authorities, that, after this notification, the sending of a message not to be repeated is equivalent to declaring it not important; so, within the rule stated in the last section, requiring of the transmitter only a moderate degree of care. Yet it does not absolve the company from responsibility for the lack of so much of care

Carew, 15 Mich. 525; Western Union Tel. v. Fontaine, 58 Ga. 433; De Rutte v. New York, &c. Tel. 1 Daly, 547; Breese v. United States Tel. 45 Barb. 274; Birney v. New York, &c. Tel. 18 Md. 341.

¹ Western Union Tel. v. Fontaine, 58 Ga. 433; Merrill v. Western Union Tel. 78 Maine, 97; Stuart v. Western Union Tel. 66 Texas, 580; Bodkin v. Western Union Tel. 31 Fed. Rep. 134; First Nat. Bank v. Western Union Tel. 30 Ohio State, 555; Daughtery v. American Union Tel. 75 Ala. 168; Western Union Tel. v. Scircle, 103 Ind. 227; Julian v. Western Union Tel. 98 Ind. 327; Logan v. Western Union Tel. 84 Ill. 468; Sprague v. Western Union

Tel. 6 Daly, 200; Western Union Tel. v. Valentine, 18 Bradw. 57; Western Union Tel. v. Fatman, 73 Ga. 285; Western Union Tel. v. Graham, 1 Colo. 230; Beaupre v. Pac. &c. Tel. 21 Minn. 155; Daniel v. Western Union Tel. 61 Texas, 452; Western Union Tel. v. Reynolds, 77 Va. 173; Parks v. Alta, &c. Tel. 13 Cal. 422; Bryant v. American Tel. 1 Daly, 575.

² Ante, § 458-470.

³ Western Union Tel. v. McDaniel, 103 Ind. 294.

⁴ Western Union Tel. v. Trissal, 98 Ind. 566.

⁵ For a specimen of the form, see Western Union Tel. v. Carew, 15 Mich. 525.

as the circumstances, thus explained, demand.¹ Further as to which,—

§ 1209. **Negligence.**—Bearing in our minds that negligence is the absence of the greater or less care which the particular circumstances demand,² and that carefulness is a duty imposed both by nature and by law on men for the protection of one another, we have the further proposition, assented to by most though not quite all courts, as already explained,³ that any bargaining by which one person releases another from responsibility for a negligent act is void as contrary to the policy of the law. Now, our telegraph companies, the same as common carriers and, indeed, all other persons possessed of the natural selfishness of mankind, are constantly striving to release themselves from the duty of carefulness to others. And they have resorted to this condition about repeating as a means of freeing themselves from the duty as to un-repeated messages, or of reducing their responsibility to a mere nominal sum. To the extent stated in the last section, the effort should be held effectual, but no further. The decisions on the question are quite variant; and, for the reason already stated,⁴ the author simply refers to some of the leading or later ones, not proposing to thread their windings.⁵

¹ See the cases cited in the next section.

² Ante, § 436-441, 1064, 1094, 1116, 1206.

³ Ante, § 1074-1076.

⁴ Ante, § 1204.

⁵ *Western Union Tel. v. Tyler*, 74 Ill. 168; *Western Union Tel. v. Harris*, 19 Bradw. 347; *Western Union Tel. v. Buchanan*, 35 Ind. 429; *Western Union Tel. v. Graham*, 1 Colo. 230; *Western Union Tel. v. Shotton*, 71 Ga. 760; *Western Union Tel. v. Cohen*, 73 Ga. 522; *Western Union Tel. v. Meek*, 49 Ind. 53; *Bartlett v. Western Union Tel.* 62 Maine, 209; *Baldwin v. United States Tel.* 45 N. Y. 744; *Western Union Tel. v. Brown*, 58 Texas, 170; *Hart v. Western Union Tel.* 66 Cal. 579; *Western Union Tel. v. Blanchard*, 68

Ga. 299; *Western Union Tel. v. Neill*, 57 Texas, 283; *White v. Western Union Tel.* 14 Fed. Rep. 710; *Pegram v. Western Union Tel.* 97 N. C. 57; *Hibbard v. Western Union Tel.* 33 Wis. 558; *Redpath v. Western Union Tel.* 112 Mass. 71; *Breese v. United States Tel.* 48 N. Y. 132; *True v. International Tel.* 60 Maine, 9; *Candee v. Western Union Tel.* 34 Wis. 471; *Sweatland v. Illinois, &c. Tel.* 27 Iowa, 433; *Tyler v. Western Union Tel.* 60 Ill. 421; *Lassiter v. Western Union Tel.* 89 N. C. 334; *Passmore v. Western Union Tel.* 28 Smith Pa. 238; *Sprague v. Western Union Tel.* 6 Daly, 200; *Jones v. Western Union Tel.* 18 Fed. Rep. 717; *Thompson v. Western Union Tel.* 64 Wis. 531; *Grinnell v. Western Union Tel.* 113 Mass.

§ 1210. **Other Conditions**, — made by the company and assented to by the senders of messages, are valid or not according to their nature, — questions into which it is not proposed further to enter.¹

§ 1211. **To whom Liable — (Uses of Thinking)**. — In an English case, an important message had been so changed by the carelessness of the company that it appeared as addressed and was delivered to one for whom it was not meant, and as coming from a person other than the real writer — wrong at both ends. And it happened so completely to fit the conditions of the two telegraph-made fictitious persons, that, being acted upon, great loss came to the party who received it. He sued the company; but the court could not discern any privity of contract between it and him, or any duty it owed him, therefore refused redress.² This case shows, among other things, how much counsel and court may lose by not thinking. Said Bramwell, L. J.: "The general rule of law is clear that no action is maintainable for a mere statement, although untrue, and although acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it."³ This general rule is admitted by the plaintiff's counsel, and *prima facie* includes the present case." And he goes on to show that the case is not within an exception which had been claimed by counsel.⁴ Now, in truth, as the report shows, the telegraph company knew from whom the message came, and to whom it was by the sender addressed. The knowledge of its receiving agent

299; *Western Union Tel. v. Adams*, 87 Ind. 598; *Clement v. Western Union Tel.* 137 Mass. 463.

¹ *Heimann v. Western Union Tel.* 57 Wis. 562; *Young v. Western Union Tel.* 65 N. Y. 163; *Western Union Tel. v. Edsall*, 63 Texas, 668; *Western Union Tel. v. McGuire*, 104 Ind. 130; *Western Union Tel. v. Jones*, 95 Ind. 228; *Western Union Tel. v. Meredith*, 95 Ind. 93; *Massengale v. Western Union Tel.* 17 Mo. Ap. 257; *Hewlett v. Western Union Tel.* 28 Fed. Rep. 181; *Wolf v. Western Union Tel.* 12 Smith,

Pa. 83; *Cole v. Western Union Tel.* 33 Minn. 227.

² *Dickson v. Reuter's Tel.* 2 C. P. D. 62, affirmed 3 C. P. D. 1.

³ In the interest of accuracy, though not important to the view I shall take in the text, I will observe that, however the law may be in England, it is certainly not precisely so with us. And I have ventured to set down the English rule as in accord with the American. It is stated, ante, § 330.

⁴ 3 C. P. D. at p. 5.

was its knowledge;¹ consequently, when by the same or any other agent it wrote the two wrong names, one at each end, and delivered it to the person for whom it was not meant, it knew it was making to the person who received it an untrue statement. This case was heard first in the Common Pleas Division, then in the Court of Appeal; and there was not a counsel or a judge who would not have admitted this fact, stated in both reports, to be in it, if he had done but a very small amount of thinking. Thus the suit miscarried, and a redress plainly due was refused. The books, English and American, are full of cases of this nature, and of those wherein judges have laid down erroneous rules of law, contrary to what they would have done had but a suggestion of some obvious thing been made by counsel. The lesson wherefrom may be stated with a brevity commonly despised by those who look only into the reports for the law, never into their own heads, and seldom into any elucidations of legal reasoning, — *Think*. To continue, —

§ 1212. **More as to whom Liable.** — Another English case holds, in line with this one, that, if the company by its carelessness alters a message to the injury, not of the sender, but of the receiver, there is no privity of contract between it and the latter, and it is not liable.² But by the settled law, at least of this country, the one on whom the sender might be conferring a benefit was entitled to avail himself of it.³ Hence he should be permitted to maintain the suit. And so, in like cases, our courts, contrary to the English, hold.⁴ And there is another view: any one who so negligently conducts his own affairs as to harm another is answerable to him in damages.⁵ The person to whom the company carries a message is not a trespasser, he is lawfully at the place;⁶ and, assuming that there is no privity of contract between it and

¹ Compare with the latter part of *burg*, 11 Casey, Pa. 298; *Markel v. Western Union Tel.* 19 Mo. Ap. 80; ante, § 1096.

² *Playford v. United Kingdom Elec. Tel. Law Rep.* 4 Q. B. 706. *La Grange v. Southwestern Tel.* 25 La. An. 383.

³ *Bishop Con.* § 1219.

⁴ *Aiken v. Western Union Tel.* 5 1074. *S. C.* 358; *New York, &c. Tel. v. Dry-*

⁵ Ante, § 98, 104, 115, 150, 436,

⁶ Ante, § 1036, 1092, 1118.

him, still, under the doctrine of tort, it owes him the duty so to conduct its own affairs as not, by its negligence, or by its fraud, to deliver to him a false message to his injury.¹

III. *By Telephone.*

§ 1213. **General.** — A telephone company is a species of telegraph company, and is within statutes on the latter subject.² It has been deemed, therefore, a sort of common carrier,³ and it may not arbitrarily refuse its facilities to a person complying with its rules.⁴ It is, to a degree probably not yet defined in full, subject to legislative regulation.⁵ We have too few adjudications to render a continuation of these elucidations desirable.

§ 1214. *The Doctrine of this Chapter restated.*

Telegraph companies, wherein may be included telephone companies, are common carriers, not of goods, but of words. They are not, like common carriers of goods, but more nearly resembling those of passengers, insurers of the safety of the thing sent. Their liability, therefore, comes simply from negligence; not ordinarily, perhaps never unless they expressly agree to insure, from non-negligent miscarriage. The degree of carefulness required of them varies with the magnitude of the interest and of the consequences of a mistake. The mails are transported by the government. It is not answerable to a private person for any misfeasance therein. But the postmaster, or a clerk, or other fellow-officer may be required to compensate a person injured by his individual negligence, or by that of a servant, yet not by that of a sworn clerk or other fellow-officer.

¹ *Elwood v. Western Union Tel.* 45 N. Y. 549.

² *Attorney-General v. Edison Teleph.* 6 Q. B. D. 244; *Franklin v. Northwestern Teleph.* 69 Iowa, 97; *Chesapeake, &c. Teleph. v. Baltimore, &c. Tel.* 66

Md. 399; *Wisconsin Teleph. v. Oshkosh*, 62 Wis. 32.

³ *Central Union Teleph. v. Bradbury*, 106 Ind. 1.

⁴ *The State v. Nebraska Teleph.* 17 Neb. 126.

⁵ *Hockett v. The State*, 105 Ind. 250.

BOOK VII.

SPECIAL TOPICS AND IN REVIEW.

CHAPTER LII.

INJURIES BY AND TO ANIMALS.

§ 1215, 1216. Introduction.

1217-1219. Transportation of Animals.

1220-1229. Rights and Liabilities of Owners.

1230, 1231. Wild Animals.

1232. Doctrine of Chapter restated.

§ 1215. **What for this Chapter.** — The subject of this chapter would admit of expansion into great numbers of minor topics; conducting us backward over ground already trodden, and onward through whatever remains of the entire field of non-contract right and wrong. For the lower animals constitute in part the companions, the servants, and the property of man. And wherever he is, they are. Moreover, such expansion would introduce us to multitudes of statutes, differing in the several States. So wide a scope for the chapter is neither desirable nor possible. Therefore we shall endeavor only to pick up a few threads of doctrine, reserved out of the elucidations of the preceding chapters, to be presented in their order in this place.

§ 1216. **How divided.** — We shall consider, I. The Transportation of Domestic Animals; II. The Rights and Liabilities of the Owners of Domestic Animals; III. Wild Animals.

I. *The Transportation of Domestic Animals.*

§ 1217. **Compared.** — The transportation of domestic animals by railroads and other common carriers is simply the carriage of merchandise. Therefore it is governed by the same rules;¹ which, to appearance but not in reality, are slightly modified by the special nature of this sort of freight.² Thus, —

§ 1218. **Defined.** — The common carrier of animals is under the same obligation for their safe carriage and delivery, within a reasonable time, as the common carrier of ordinary goods; except that he is not an insurer against injuries resulting from inherent defects in them, — such, for example, as render them unable to endure a properly conducted journey, — or from their special natures and propensities.³ This also is the rule for the carriage of other things within the same reason.⁴ To illustrate, a common carrier is not answerable for a leakage caused by an imperfection in the bung of a cask committed with its contents to him,⁵ yet otherwise he insures the safe carriage of the package. Hence, —

§ 1219. **General.** — Since the doctrine of common carriers, as thus explained, applies to the transportation of domestic animals, it would be a departure from the plan of this volume to pursue the subject further.

¹ Ante, § 1152.

² *McCoy v. Keokuk, &c.* Rld. 44 Iowa, 424; *Kendall v. London, &c.* Ry. Law Rep. 7 Ex. 373; *Gill v. Manchester, &c.* Ry. Law Rep. 8 Q. B. 186, 196; *North Pennsylvania Rld. v. Commercial Bank*, 123 U. S. 727.

³ *Blower v. Great Western Ry.* Law Rep. 7 C. P. 655, 662 (for "an insurer is not liable for accidents happening through the inherent vice of the thing insured, but only for such as happen through adventitious causes," p. 663, *Willes, J.*); *Rixford v. Smith*, 52 N. H. 355; *South and North Alabama Rld. v. Henlein*, 52 Ala. 606; *Hall v. Renfro*,

3 Met. Ky. 51; *Penn v. Buffalo, &c.* Rld. 49 N. Y. 204; *Mynard v. Syracuse, &c.* Rld. 71 N. Y. 180; *Bamberg v. South Carolina Rld.* 9 S. C. 61; *Cragin v. New York Cent. Rld.* 51 N. Y. 61; *Clarke v. Rochester, &c.* Rld. 4 Kernan, 570; *Indianapolis, &c. Ry. v. Jurey*, 8 Bradw. 160.

⁴ *Ib.*; *The Brig Collenberg*, 1 Black, 170; *Nelson v. Woodruff*, 1 Black, 156; *Ship Howard v. Wissman*, 18 How. U. S. 231.

⁵ *Hudson v. Baxendale*, 2 H. & N. 575; *Cox v. London, &c. Ry.* 3 Fost. & F. 77.

II. *The Rights and Liabilities of the Owners of Domestic Animals.*

§ 1220. **Obscurities — Inaccurate Language — (Negligence).**
— On the subject of this sub-title, and on many other legal subjects, the books are in some degree obscure, and particular passages either seem to be or are in fact erroneous. This proceeds in part from the imperfections of our language and in part from imperfect apprehensions in the minds of those who employ it. For example, as to the common-law liability of the owners of domestic animals straying upon the unfenced land of others, we saw how, when the question came up incidentally in illustrating another doctrine, the English judges, in a noted case,¹ mistook; assuming the responsibility to be absolute, instead of consisting of the duty to use due care to prevent an escape. In this instance it is plain that the judges did so, in fact, understand the law to be. But it is quite natural to employ words which might be misinterpreted to denote the same thing, contrary to what was meant. For illustration, the present author's statement of the doctrine in a previous section² might be misconstrued; while yet, if he had so set it down as to avoid the possibility of misapprehension, he would have confused the reader, on a question important to be made distinct and clear. And the same thing may be illustrated by an often-quoted passage from Blackstone. He says: "A man is answerable for not only his own trespass, but that of his cattle also; for, if by his negligent keeping they stray upon the land of another, and much more if he permits or drives them on, and they there tread down his neighbor's herbage, and spoil his corn or his trees, this is a trespass for which the owner must answer in damages."³ The first part of this sentence might be mistaken, and it would not be difficult to quote instances in which it has been, as declaring that the responsibility of a man for his cattle's trespass is the same as for his own, absolute. But the remaining part brings

¹ *Rylands v. Fletcher*, as explained ante, § 839, note.

² Ante, § 801.

³ 3 Bl. Com. 211.

out the true doctrine, and it governs the former part; namely, the liability flows from the "negligent keeping" of the cattle. So that where there is no negligence there is no ground of action; his duty is to use care, and he is not answerable for what his cattle do when not himself negligent.¹ A contrary doctrine to this would overturn what is most fundamental in the entire law of non-contract right and wrong; which, as we have had occasion in nearly every chapter of this volume to see, is, that one who carefully and circumspectly conducts his own affairs is not liable to another casually injured by the doing.² Now, —

§ 1221. **Doctrine defined.** — The doctrine of this sub-title is, that the ownership of animals does not differ from any other ownership of personal property; but he who has the custody of an animal is liable for whatever harm it does in consequence of his negligent keeping of it, yet not for an injury inflicted by it through an inevitable accident. And he who by some wrongful act does a damage to an animal, without the owner's fault, must compensate him. Hence, —

§ 1222. **The Doctrine of Negligence,** — explained and illustrated in a preceding chapter,³ is the leading doctrine of our present sub-title. And it is the same, when applied to animals, as to other things which are the subjects of ownership.⁴ Thus, —

§ 1223. **Diverse Natures.** — The different natures of inanimate things work no changes in the doctrine of negligence as applied to them respectively; yet, when the idea takes the embodied forms which admit of being expressed in words, a marked dissimilarity not unfrequently appears. For example,

¹ And see *Dolph v. Ferris*, 7 Watts & S. 367, 369; *Baldwin v. Ensign*, 49 Conn. 113, 117, 118; *Wells v. Howell*, 19 Johns. 385; *Stafford v. Ingersol*, 3 Hill, N. Y. 38; *Van Leuven v. Lyke*, 1 Comst. 515; *Tenant v. Golding*, 1 Salk. 21; s. c. nom. *Tenant v. Goldwin*, 2 Ld. Raym. 1089; *Weymouth v. Gile*, 72 Maine, 446; *Noyes v. Colby*,

10 Fost. N. H. 143; *Blaisdell v. Stone*, 60 N. H. 507.

² See, for example, ante, § 673, 898, and places there referred to.

³ Ante, § 433-484.

⁴ Ante, § 182; *Gilman v. Noyes*, 57 N. H. 627; *Weide v. Thiel*, 9 Bradw. 223; *Wagner v. Goldsmith*, 78 Ind. 517; *Ficken v. Jones*, 28 Cal. 618; *Milne v. Walker*, 59 Iowa, 186.

the places and surroundings in which it is negligence, or not, to use fire for blasting, for running a steam-boiler, or for warming the dwelling-house, all differ;¹ and we multiply words to convey the outwardly dissimilar, yet inwardly identical, idea. So the differences between a horse and a block of wood, a lamb and a rocking-chair, a vicious animal and a harmless one, and numerous other dissimilitudes, create different expressions of the doctrine of negligence, as applied to them, but no diversities in the doctrine itself. This is the same thing which we saw in respect of the common carriage of animals, compared with that of ordinary merchandise.² Further to illustrate,—

§ 1224. **Escaping from Way.** — When cattle or horses are being lawfully driven or conducted along a highway, if, differing in their nature from a load of wood, they escape into adjoining grounds and do damage, similar to what the wood might do if negligently set on fire in a heavy wind, the person in charge of them is answerable if the escape was through his negligence, otherwise he is not.³ Again,—

§ 1225. **Vicious or not.** — Most domestic animals, mingling freely with men, do them no harm. Therefore it is not a negligent keeping of such an animal to permit it to go upon the public ways and other places where it is not a trespasser,⁴ though they are frequented also by men; and if a man is injured by the animal, it not being known to be vicious, the owner will not be responsible.⁵ But if, for example, the owner of a horse has notice that when at large it runs and kicks upon the sidewalks, his turning it loose in the streets of a city will be a negligent keeping; and he will be answerable for whatever damage it does to persons and their property.⁶ And the doctrine is general, commonly more briefly expressed, that

¹ Ante, § 831-833.

² Ante, § 1217, 1218.

³ *Mills v. Stark*, 4 N. H. 512; *Goodwyn v. Cheveley*, 4 H. & N. 631; *Hartford v. Brady*, 114 Mass. 466; *Amstein v. Gardner*, 132 Mass. 28; *Dovaston v. Payne*, 2 H. Bl. 527; *Cool v. Crommet*, 13 Maine, 250; *Blaisdell v. Stone*, 60 N. H. 507.

⁴ *Decker v. Gammon*, 44 Maine, 322.

⁵ *Bell v. Leslie*, 24 Mo. Ap. 661; *Dearth v. Baker*, 22 Wis. 73; *Cox v. Burbidge*, 13 C. B. n. s. 430; *Smith v. Causey*, 22 Ala. 568; *Vrooman v. Lawyer*, 13 Johns. 339.

⁶ *Dickson v. McCoy*, 39 N. Y. 400.

the owner of any animal which he knows to be "accustomed to bite mankind," or to inflict other harm upon men or their property, will, if he does not restrain it, be compellable to pay the damage it does.¹ Whatever distinctions may appear in the words of judges spoken in this sort of case, the just doctrine in all is, that it is the duty of the owner to keep his animal with a proper regard for the welfare of others, and that it is actionable negligence in him to omit the particular sort and degree of care which its nature and propensities, as known by him, require. Once more,—

§ 1226. **Fence.**—As already seen, if there are no fences, and if the law requires none, it will be palpable negligence in the owner of such an animal as a horse or an ox, to turn it loose where it may stray upon the grounds of a neighbor and do damage. Hence the common-law doctrine, usually more briefly expressed, is, that the owner is answerable for his cattle's trespasses on unfenced lands.² But when fences are built, or when the law requires them, or permits cattle to run at large, what was before negligence ceases to be such; and other distinctions arise, into which it is not necessary here to enter.³

§ 1227. **Diseased Animals.**—An owner who knows that his animals have a disease communicable to animals or to men,⁴ yet permits them to run at large to the injury of other people or their animals, is answerable in damages; for this is a negligent disregard of his legal and social duties.⁵ We have in some of the States statutes which further extend or define this common-law doctrine.⁶ In like manner,—

¹ *Spalding v. Oakes*, 42 Vt. 343; *Adams*, 70 Ill. 291; *Pool v. Alger*, 11 Murray v. Young, 12 Bush, 337; *Kelly Gray*, 489.

v. Tilton, 2 Abb. Ap. 495; *Pickering v. Orange*, 1 Scam. 492; *Hudson v. Roberts*, 6 Exch. 697; *May v. Burdett*, 9 Q. B. 101; *Woolf v. Chalker*, 31 Conn. 121; *Kittredge v. Elliott*, 16 N. H. 77; *Popplewell v. Pierce*, 10 Cush. 509; *Marsh v. Jones*, 21 Vt. 378; *Arnold v. Norton*, 25 Conn. 92.

² Ante, § 801, 839, note, 1220.

³ Ante, § 804, 806-808; *Ozburn v.*

⁴ Ante, § 414.

⁵ *Kemmish v. Ball*, 30 Fed. Rep. 759; *Hite v. Blandford*, 45 Ill. 9. See *Fisher v. Clark*, 41 Barb. 329; *Hawks v. Locke*, 139 Mass. 205.

⁶ *Harris v. Hatfield*, 71 Ill. 298; *Kenney v. Hannibal, &c.* Rld. 62 Mo. 476; *Frye v. Chicago, &c.* Rld. 73 Ill. 399; *Hatch v. Marsh*, 71 Ill. 370; *Sangamon Dist. Co. v. Young*, 77 Ill. 197; *Bradford v. Floyd*, 80 Mo. 207.

§ 1228. **Injuries to Animals** — are redressed on the same principles as similar injuries to other personal property.¹ For example, one who hires a horse under the promise to load it with only a given weight, yet injures it by putting upon it a heavier load;² or hires it under the law's implied promise of good treatment,³ yet misuses it to its injury;⁴ or hires it for a particular purpose, then harms it by employing it for another,⁵ is answerable for the damage, the same as where he does a similar injury to other personal property.

§ 1229. **Railroad injuring or killing.** — Railroad collisions with animals, whereby they are wounded or killed, are among the most common of the forms of harm to them. They occur under a great diversity of fence laws, of laws regulating their running at large, and of other relevant laws, prevailing in our respective States. The one doctrine governing these different cases is plain; namely, that the road is responsible if harm comes to an animal from its negligent running or other negligence, and if the negligence of the owner does not contribute thereto; but, if the owner's negligence does contribute, or if the road is not itself negligent, the injury will be without recompense. Yet what is negligence and what is contributory negligence will depend largely upon the fence and other similar laws of the particular State. To enter into the details would be impossible within our limited space; nor, if it were possible, would they be of any considerable help to the reader. A few of the later cases, by reference to which others may be found, are cited in the note.⁶

¹ *Kimball v. Holmes*, 60 N. H. 163; *Peer v. Ryan*, 54 Mich. 224; *Richards v. Sperry*, 2 Wis. 216; *Carrier v. Dorrance*, 19 S. C. 30; *Oxley v. Watts*, 1 T. R. 12; *Barnes v. Chapin*, 4 Allen, 444.

² *Bigg's Case*, 2 Leon. 104.

³ *Ruggles v. Fay*, 31 Mich. 141.

⁴ *Com. Dig. Action upon Case for Misf. A. 3*; *Frost v. Plumb*, 40 Conn. 111; *Austin v. Miller*, 74 N. C. 274; *Rives v. Moxham*, Hob. 187 b; *Bigg's Case*, 2 Leon. 104.

⁵ *Fox v. Young*, 22 Mo. Ap. 386.

⁶ *Alabama*. — *Nashville, &c. Rld. v. Comans*, 45 Ala. 437; *Mobile, &c. Rld. v. Malone*, 46 Ala. 391; *Mobile, &c. Rld. v. Williams*, 53 Ala. 595; *South and North Alabama Rld. v. Hagood*, 53 Ala. 647; *East Tennessee, &c. Rld. v. Bayliss*, 77 Ala. 429; *East Tennessee, &c. Rld. v. Carlross*, 77 Ala. 443; *Alabama Great So. Rld. v. McAlpine*, 80 Ala. 73; *Alabama Great So. Rld. v. Chapman*, 80 Ala. 615.

Arkansas. — *Hot Springs Rld. v. Newman*, 36 Ark. 607; *Little Rock, &c. Ry. v. Finley*, 37 Ark. 562; *Little*

III. *Wild Animals.*

§ 1230. *Injuries from.*—One who keeps a wild animal, of a sort likely to do mischief if let loose, must exercise in the

Rock, &c. Ry. v. Trotter, 37 Ark. 593 ; Little Rock, &c. Ry. v. Henson, 39 Ark. 413 ; Kansas City, &c. Rld. v. Summers, 45 Ark. 295.

California.—Needham v. San Francisco, &c. Rld. 37 Cal. 409 ; McCoy v. California Pac. Rld. 40 Cal. 532 ; Sweeney v. Central Pac. Rld. 57 Cal. 15.

Colorado.—Denver, &c. Ry. v. Chandler, 8 Colo. 371.

Georgia.—Macon, &c. Rld. v. Barber, 42 Ga. 300 ; Macon, &c. Rld. v. Vaughn, 48 Ga. 464 ; Atlantic, &c. Rld. v. Burt, 49 Ga. 606 ; Georgia Rld. &c. Co. v. Neely, 56 Ga. 540 ; Western, &c. Rld. v. Steadly, 65 Ga. 263 ; Rossignoll v. Northeastern Rld. 75 Ga. 354 ; Davis v. Central Rld. 75 Ga. 645.

Illinois.—Illinois Cent. Rld. v. Baker, 47 Ill. 295 ; Toledo, &c. Ry. v. Parker, 49 Ill. 385 ; Toledo, &c. Ry. v. Darst, 51 Ill. 365 ; Chicago, &c. Ry. v. Harris, 54 Ill. 528 ; Illinois Cent. Rld. v. Hall, 58 Ill. 409 ; Chicago, &c. Rld. v. Seirer, 60 Ill. 295 ; Toledo, &c. Ry. v. Deacon, 63 Ill. 91 ; Chicago, &c. Rld. v. Bradfield, 63 Ill. 220 ; Ohio, &c. Ry. v. Jones, 63 Ill. 472 ; Paris, &c. Rld. v. Mullins, 66 Ill. 526 ; Rockford, &c. Rld. v. Linn, 67 Ill. 109 ; Chicago, &c. Rld. v. Haggerty, 67 Ill. 113 ; Rockford, &c. Rld. v. Lynch, 67 Ill. 149 ; Toledo, &c. Ry. v. McGinnis, 71 Ill. 346 ; Toledo, &c. Ry. v. Lockhart, 71 Ill. 627 ; Toledo, &c. Ry. v. Barlow, 71 Ill. 640 ; Ewing v. Chicago, &c. Rld. 72 Ill. 25 ; St. Louis, &c. Ry. v. Casner, 72 Ill. 384 ; Rockford, &c. Rld. v. Irish, 72 Ill. 404 ; St. Louis, &c. Ry. v. Dorman, 72 Ill. 504 ; Rockford, &c. Rld. v. Rafferty, 73 Ill. 58 ; Gilman, &c. Rld. v. Spencer, 76 Ill. 192 ; Peoria, &c. Rld. v. Barton, 80 Ill. 72 ; Peoria, &c. Rld. v. Dugan, 10 Bradw. 233 ; Louisville, &c. Rld. v.

Upton, 18 Bradw. 605 ; Indiana, &c. Ry. v. Drum, 21 Ill. Ap. 331.

Indiana.—Jeffersonville, &c. Rld. v. Nichols, 30 Ind. 321 ; Jeffersonville, &c. Rld. v. Brevoort, 30 Ind. 324 ; Jeffersonville, &c. Rld. v. Avery, 31 Ind. 277 ; Bellefontaine Ry. v. Reed, 33 Ind. 476 ; Toledo, &c. Ry. v. Cary, 37 Ind. 172 ; Indianapolis, &c. Rld. v. Harter, 38 Ind. 557 ; Jeffersonville, &c. Rld. v. Underhill, 40 Ind. 229 ; Jeffersonville, &c. Rld. v. Vancant, 40 Ind. 233 ; Ohio, &c. Ry. v. Cole, 41 Ind. 331 ; Cleveland, &c. Rld. v. Swift, 42 Ind. 119 ; Jeffersonville, &c. Rld. v. Huber, 42 Ind. 173 ; Indianapolis, &c. Rld. v. Bonnell, 42 Ind. 539 ; Indianapolis, &c. Rld. v. Christy, 43 Ind. 143 ; Jeffersonville, &c. Rld. v. Adams, 43 Ind. 402 ; Toledo, &c. Ry. v. Owen, 43 Ind. 405 ; Pittsburgh, &c. Ry. v. Bowyer, 45 Ind. 496 ; Indianapolis, &c. Ry. v. McBrown, 46 Ind. 229 ; Jeffersonville, &c. Rld. v. Underhill, 48 Ind. 389 ; Toledo, &c. Ry. v. Milligan, 52 Ind. 505 ; Jeffersonville, &c. Rld. v. Lyon, 55 Ind. 477 ; Wabash Ry. v. Forshee, 77 Ind. 158 ; Louisville, &c. Rld. v. Schmidt, 81 Ind. 264 ; Louisville, &c. Ry. v. Goodbar, 102 Ind. 596 ; Louisville, &c. Ry. v. Thomas, 106 Ind. 10.

Iowa.—McNaught v. Chicago, &c. Rld. 30 Iowa, 336 ; Stewart v. Burlington, &c. Rld. 32 Iowa, 561 ; Flattes v. Chicago, &c. Rld. 35 Iowa, 191 ; Cleveland v. Chicago, &c. Rld. 35 Iowa, 220 ; Searles v. Milwaukee, &c. Ry. 35 Iowa, 490 ; Henderson v. St. Louis, &c. Rld. 36 Iowa, 387 ; Jackson v. Chicago, &c. Ry. 36 Iowa, 451 ; Sandham v. Chicago, &c. Rld. 38 Iowa, 88 ; Correll v. Burlington, &c. Rld. 38 Iowa, 120 ; Edson v. Central Rld. 40 Iowa, 47 ; Finch v. Central Rld. 42 Iowa, 304 ;

keeping a care proportioned to the danger and consequences of a misfeasance.¹ The doctrine is the same as that just

Kuhn v. Chicago, &c. Rld. 42 Iowa, 420; *Downing v. Chicago, &c. Rld.* 43 Iowa, 96; *Tyson v. Keokuk, &c. Rld.* 43 Iowa, 207; *Tredway v. Sioux City, &c. Ry.* 43 Iowa, 527; *Young v. St. Louis, &c. Ry.* 44 Iowa, 172; *Van Horn v. Burlington, &c. Ry.* 59 Iowa, 33; *Raridon v. Central Iowa Ry.* 65 Iowa, 640; *Brentner v. Chicago, &c. Ry.* 68 Iowa, 530.

Kansas. — *Union Pac. Ry. v. Rollins*, 5 Kan. 167; *Missouri Pac. Rld. v. Leggett*, 27 Kan. 323; *Atchison, &c. Rld. v. Cash*, 27 Kan. 587; *Missouri Pac. Ry. v. Wilson*, 28 Kan. 637.

Kentucky. — *Louisville, &c. Rld. v. Brown*, 13 Bush, 475.

Maine. — *Gilman v. European, &c. Ry.* 60 Maine, 235; *Wilder v. Maine Cent. Rld.* 65 Maine, 332.

Maryland. — *Baltimore, &c. Rld. v. Mulligan*, 45 Md. 486; *Annapolis, &c. Rld. v. Baldwin*, 60 Md. 88.

Massachusetts. — *Sawyer v. Vermont, &c. Rld.* 105 Mass. 196; *Keliher v. Connecticut River Rld.* 107 Mass. 411; *Maynard v. Boston, &c. Rld.* 115 Mass. 458; *McDonnell v. Pittsfield, &c. Rld.* 115 Mass. 564; *Darling v. Boston, &c. Rld.* 121 Mass. 118; *Leonard v. Fitchburg Rld.* 143 Mass. 307.

Michigan. — *Flint, &c. Ry. v. Lull*, 28 Mich. 510; *Chicago, &c. Ry. v. Campbell*, 47 Mich. 265; *Detroit, &c. Ry. v. Hayt*, 55 Mich. 347; *Lemon v. Chicago, &c. Ry.* 59 Mich. 618.

Minnesota. — *Locke v. First Division, &c. Rld.* 15 Minn. 350; *Mathews v. St. Paul, &c. Rld.* 18 Minn. 434; *Fritz v. First Division, &c. Rld.* 22 Minn. 404; *Fleming v. St. Paul, &c. Rld.* 27 Minn. 111; *Watier v. Chicago, &c. Ry.* 31 Minn. 91; *Greeley v. St. Paul, &c. Ry.* 33 Minn. 136; *Blais v. Minneapolis, &c. Ry.* 34 Minn. 57.

Mississippi. — *Memphis, &c. Rld. v. Blakeney*, 43 Missis. 218; *Raiford v.*

Mississippi Cent. Rld. 43 Missis. 233; *Memphis, &c. Rld. v. Orr*, 43 Missis. 279; *Chicago, &c. Rld. v. Jones*, 59 Missis. 465; *Tyler v. Illinois Cent. Rld.* 61 Missis. 445; *Illinois Cent. Rld. v. Walker*, 63 Missis. 13; *Illinois Cent. Rld. v. Weathersby*, 63 Missis. 581; *Newman v. Vicksburg, &c. Rld.* 64 Missis. 115; *Yazoo, &c. Rld. v. Brumfield*, 64 Missis. 637.

Missouri. — *Iba v. Hannibal, &c. Rld.* 45 Mo. 469; *Grau v. St. Louis, &c. Ry.* 54 Mo. 240; *Ells v. Pacific Rld.* 55 Mo. 278; *Crafton v. Hannibal, &c. Rld.* 55 Mo. 580; *Morris v. St. Louis, &c. Ry.* 58 Mo. 78; *Owens v. Hannibal, &c. Rld.* 58 Mo. 386; *Stoneman v. Atlantic, &c. Rld.* 58 Mo. 503; *Cook v. Hannibal, &c. Rld.* 63 Mo. 397; *Swearingen v. Missouri, &c. Rld.* 64 Mo. 73; *Robertson v. Atlantic, &c. Rld.* 64 Mo. 412; *Jackson v. St. Louis, &c. Ry.* 74 Mo. 526; *Wallace v. St. Louis, &c. Ry.* 74 Mo. 594; *Goodwin v. Chicago, &c. Rld.* 75 Mo. 73; *Scott v. St. Louis, &c. Ry.* 75 Mo. 136; *Turner v. St. Louis, &c. Ry.* 76 Mo. 261; *Schulte v. St. Louis, &c. Ry.* 76 Mo. 324; *Young v. Hannibal, &c. Rld.* 79 Mo. 336; *Jantzen v. Wabash, &c. Ry.* 83 Mo. 171; *Ellis v. Missouri Pac. Ry.* 83 Mo. 372; *Laney v. Kansas City, &c. Rld.* 83 Mo. 466; *Binicker v. Hannibal, &c. Rld.* 83 Mo. 660; *Stanley v. Missouri Pac. Ry.* 84 Mo. 625; *Peddicord v. Missouri Pac. Ry.* 85 Mo. 160; *Milburn v. Kansas City, &c. Rld.* 86 Mo. 104; *Hines v. Missouri Pac. Ry.* 86 Mo. 629; *Lepp v. St. Louis, &c. Ry.* 87 Mo. 139; *Wilson v. St. Louis, &c. Ry.* 87 Mo. 431; *Townesley v. Missouri Pac. Ry.* 89 Mo. 31; *Donovan v. Hannibal, &c. Rld.* 89 Mo. 147; *Foster v. St. Louis, &c. Ry.* 90 Mo. 116; *Smith v. St. Louis, &c. Ry.* 91 Mo. 58; *Mayfield v. St. Louis, &c. Ry.* 91 Mo. 296; *Holland v. West End Narrow Gauge Ry.* 16 Mo. Ap.

¹ Ante, § 1064, 1116, 1129.

explained of the keeping of a domestic animal known to be vicious.¹ But the knowledge of the vicious nature is included in the knowledge that the animal is of a dangerous species, and it need not be separately shown;² as, says Lord Hale, "if it be a beast that is *feræ naturæ*, as a lion, a bear, a wolf, yea, an ape or monkey."³ The nature and extent of the care will plainly vary with the sort of animal and the surroundings. It appears to have been once deemed that a

172; *Vaughn v. Missouri Pac. Rld.* 17 Mo. Ap. 4; *Moreland v. Missouri Pac. Ry.* 17 Mo. Ap. 77; *Dorman v. Missouri Pac. Ry.* 17 Mo. Ap. 337; *Apitz v. Missouri Pac. Ry.* 17 Mo. Ap. 419; *Boggs v. Missouri Pac. Ry.* 18 Mo. Ap. 274; *Harlan v. Wabash, &c. Ry.* 18 Mo. Ap. 483; *White v. St. Louis, &c. Rld.* 20 Mo. Ap. 564; *Judd v. Wabash, &c. Ry.* 23 Mo. Ap. 56; *Long v. St. Louis, &c. Ry.* 23 Mo. Ap. 178; *Hoffman v. Missouri Pac. Ry.* 24 Mo. Ap. 546; *Carpenter v. St. Louis, &c. Ry.* 25 Mo. Ap. 110; *Smith v. St. Louis, &c. Ry.* 25 Mo. Ap. 113; *Grant v. Hannibal, &c. Ry.* 25 Mo. Ap. 227; *Mason v. Missouri Pac. Ry.* 25 Mo. Ap. 473; *Pucket v. St. Louis, &c. Ry.* 25 Mo. Ap. 650.

Nebraska. — *Burlington, &c. Rld. v. Webb*, 18 Neb. 215.

New Hampshire. — *Hook v. Worcester, &c. Rld.* 58 N. H. 251; *Cressey v. Northern Rld.* 59 N. H. 564.

New York. — *Spinner v. New York Cent. &c. Rld.* 67 N. Y. 153; *Sheaf v. Utica, &c. Rld.* 2 Thomp. & C. 388.

North Carolina. — *Jones v. North Carolina Rld.* 70 N. C. 626; *Page v. North Carolina Rld.* 71 N. C. 222; *Proctor v. Wilmington, &c. Rld.* 72 N. C. 579; *Pippen v. Wilmington, &c. Rld.* 75 N. C. 54; *Roberts v. Richmond, &c. Rld.* 88 N. C. 560; *Farmer v. Wilmington, &c. Rld.* 88 N. C. 564; *Winston v. Raleigh, &c. Rld.* 90 N. C. 66; *Wilson v. Norfolk, &c. Rld.* 90 N. C. 69; *Boing v. Raleigh, &c. Rld.* 91 N. C. 199; *Snowden v. Norfolk So. Rld.* 95 N. C. 93.

Ohio. — *Sandusky, &c. Rld. v. Sloan*, 27 Ohio State, 341; *Pittsburgh, &c. Ry. v. McMillan*, 37 Ohio State, 554; *Pittsburgh, &c. Ry. v. Smith*, 38 Ohio State, 410.

South Carolina. — *Danner v. South Carolina Rld.* 4 Rich. 329; *Roof v. Charlotte, &c. Rld.* 4 S. C. 61; *Rowe v. Greenville, &c. Rld.* 7 S. C. 167; *Jones v. Columbia, &c. Rld.* 20 S. C. 249; *Simkins v. Columbia, &c. Rld.* 20 S. C. 258.

Tennessee. — *Nashville, &c. Rld. v. Thomas*, 5 Heisk. 262; *Louisville, &c. Rld. v. Stone*, 7 Heisk. 468; *East Tennessee, &c. Rld. v. Feathers*, 10 Lea, 103.

Texas. — *Houston, &c. Ry. v. Terry*, 42 Texas, 451; *International, &c. Rld. v. Cocke*, 64 Texas, 151.

Vermont. — *Bemis v. Connecticut, &c. Rld.* 42 Vt. 375; *Condon v. Central Vermont Rld.* 56 Vt. 390.

Virginia. — *Trout v. Virginia, &c. Rld.* 23 Grat. 619; *Orange, &c. Rld. v. Miles*, 76 Va. 773.

West Virginia. — *Heard v. Chesapeake, &c. Ry.* 26 W. Va. 455.

Wisconsin. — *Jones v. Sheboygan, &c. Rld.* 42 Wis. 306; *Curry v. Chicago, &c. Ry.* 43 Wis. 665.

¹ Ante, § 1225.

² *Besozzi v. Harris*, 1 Fost. & F. 92; *Michell v. Allestry*, 3 Keb. 650; *Jenkins v. Turner*, 3 Salk. 13, 1 Ld. Raym. 109, 2 Salk. 662; *May v. Burdett*, 9 Q. B. 101; *Scribner v. Kelley*, 38 Barb. 14; *Laverone v. Mangianti*, 41 Cal. 138.

³ 1 Hale P. C. 430.

person who has a wild beast is absolutely responsible for its mischief, though chargeable with no negligence.¹ But plainly the doctrine is otherwise now. Collections of wild animals, including the most dangerous, abound in our largest cities; and they are carried through the country for public exhibition. Everywhere and by all they are tolerated. And it requires no argument to show that, while the duty of their keepers is extremely grave, demanding of them the highest diligence, they are not outlaws from the protection of the universal rule which exempts men from liability for inevitable accidents.

§ 1231. *Injuries to.* — In the chapter on "Hunting and Fishing," further on, something will be said of ownership in wild animals. If, in law, one owns a wild animal, plainly he can have redress for a damage done to it; not otherwise.

§ 1232. *The Doctrine of this Chapter restated.*

Domestic animals are personal property. The owners and keepers of them are under the same liabilities and are entitled to the same rights, in respect of them, of their keeping, and of their carriage, as the owners of other personal property. The natures of this property differ more or less from those of dry goods, of groceries, of grain, of coal, of medicine, and of intoxicating drinks. And, to superficial sight, the law varies with the nature of the thing; to the deeper and clearer sight, it does not, but the changing things illumine and render

¹ Thus Lord Hale says, that, in the case of a "wild beast, or in case of a bull or cow that doth damage where the owner knows of it, he must at his peril keep him up safe from doing hurt; for, though he use his diligence to keep him up, if he escape and do harm the owner is liable to answer damages." 1 Hale P. C. 430. Probably this doctrine may be regarded as a branch of an old one now exploded, another branch whereof related to fire as explained in a note in a preceding chapter. Ante, § 833, note. During the early dawn-

ings of our jurisprudence, a considerable number of things which have now become clear stood before the judicial mind in a mist. This, I presume, we may reckon as one of them. If I deemed it a judicious use of the pages of this book, I should here endeavor to trace this sort of thing down from the early darkness, through the increasing light, to the present time; showing, all along the way, the mist-spots more and more illumined, yet not, even at the present day, absolutely and perfectly dispelled.

beautiful the unvarying law. This chapter is an attempt to illustrate this truth. Yet it does not ignore the fact that the books contain many passages in which this truth is either fully or partially ignored. Those passages are not law; because the law cannot be a contradiction, and because the doctrine adverse to them is established beyond controversy or even cavil. The opinions of our judges would be unsatisfactory if they contained mere conclusions, omitting all mention of the reasons therefor. And still the conclusions, not the reasons, are the law of the court. When the decisions are reviewed and wrought into text-law, this rule is reversed. The reasons — not necessarily those stated by the judges, but the real ones — now lead; they become the text-law, while the decisions constitute a sort of foundation whereon this law rests, — things to be more fully explained in the closing chapters of this volume.

CHAPTER LIII.

SPECIALLY OF DOGS.

§ 1233. **Anomalous.** — The position of dogs before the law is anomalous. Almost the only thing to be safely said of them, in view of all the shifting circumstances in which they may be placed, is, that they are animals; and that any adjective possible to be set before the word “animals” will spoil the truth of the expression. They are and are not property, are and are not domestic creatures, are and are not wild ones, are and are not public nuisances, and so to the end. The common law has its ideas of them, legislation has its different and shifting ideas. And it is the same outside of the law; as, some forms of philanthropy seek chiefly the good of men, others regard dogs as meriting the highest protection, and frightened babies tottering in their first attempts to walk as the proper food for dogs. Selfishness pets the dog that plays with it and protects its accumulated pile; the honest neighbor, whom the dog annoys, and whose family it keeps in perpetual trouble, vainly protests. We might thus go on through a long enumeration of the moral and legal adjuncts of the dog, all anomalous. But let us, instead, look more minutely at some of the particulars of the law.

§ 1234. **Vicious, Dangerous, or not.** — Within a doctrine explained in the last chapter,¹ the domestic dog is regarded as *prima facie* harmless while mingling with men or with other animals. So that its owner cannot be held liable in damages if, when no information that it is vicious has come to him, it wounds or kills a man or beast.² But if he has notice, or if

¹ Ante, § 1225.

430; Mason v. Keeling, 1 Ld. Raym.

² Kertschacke v. Ludwig, 28 Wis. 606, 608; Smith v. Pelah, 2 Stra. 1264;

otherwise he has reason to believe that his dog has a propensity to bite or to do mischief, he must restrain it; and, should he not, he will be responsible for the damage it inflicts.¹ The notice need not be that the dog has actually done injury, anything evincing its vicious disposition will suffice.² But proof of a propensity to bite animals will not alone establish a propensity to bite men.³ The knowledge of a servant having the care of the dog is the master's knowledge;⁴ otherwise, of one not having such care.⁵ The true ground of the liability is —

§ 1235. **Negligence.** — The right to keep, in the proper circumstances, a dog known to be ferocious is, by all the courts, conceded.⁶ The true meaning of which is that, in the absence of negligence or other wrong, the keeper is neither indictable nor suable; for to say that one has a right to do what the law will punish him for doing is to utter a contradiction. Still, in the face of this truth, there are cases which seem to lay it down that the owner's liability for injuries done by his vicious dog is something apart from the doctrine of negligence, and is absolute,⁷ so that no amount of carefulness will excuse him.⁸ But this is contrary alike to reason and to other authorities. Accurately viewed, his duty is simply to exercise an extremely high care, commensurate with the grave consequences of a miscarriage;⁹ for example, if a ferocious watch-dog becomes unfastened,¹⁰ or if the owner oversleeps and does not tie

Anonymous, 1 Dyer, 25 b, No. 162; *gomery v. Koester*, 35 La. An. 1091; *Dearth v. Baker*, 22 Wis. 73. *Flansburg v. Basin*, 3 Bradw. 531.

¹ *Muller v. McKesson*, 73 N. Y. 195; *Perkins v. Mossman*, 15 Vroom, 579; *Partlow v. Haggarty*, 35 Ind. 178; *Kelly v. Tilton*, 2 Abb. Ap. 495; *Moss v. Pardridge*, 9 Bradw. 490; *Murphy v. Preston*, 5 Mackey, 514; *Laherty v. Hogan*, 13 Daly, 533; *Boecher v. Lutz*, 13 Daly, 28; *Read v. Edwards*, 17 C. B. n. s. 245; *Judge v. Cox*, 1 Stark. 285; *Buckley v. Leonard*, 4 Denio, 500; *Wormley v. Gregg*, 65 Ill. 251; *Keightlinger v. Egan*, 75 Ill. 141; *Applebee v. Percy*, Law Rep. 9 C. P. 647.

² *Worth v. Gilling*, Law Rep. 2 C. P. 1; *Rider v. White*, 65 N. Y. 54; *Montgomery v. Koester*, 35 La. An. 1091; *Flansburg v. Basin*, 3 Bradw. 531. ³ *Keightlinger v. Egan*, 65 Ill. 235. ⁴ *Baldwin v. Casella*, Law Rep. 7 Ex. 325. ⁵ *Twigg v. Ryland*, 62 Md. 380. ⁶ *Laverone v. Mangianti*, 41 Cal. 138; *Loomis v. Terry*, 17 Wend. 496; *Montgomery v. Koester*, 35 La. An. 1091; *Woolf v. Chalker*, 31 Conn. 121; *Brice v. Bauer*, 108 N. Y. 428; *Logue v. Link*, 4 E. D. Smith, 63.

⁷ Ante, § 1230 and note.

⁸ *Muller v. McKesson*, 73 N. Y. 195; *Lynch v. McNally*, 7 Daly, 126.

⁹ Ante, § 1230.

¹⁰ *Brice v. Bauer*, supra.

it,¹ there is negligence past ordinary explanation, and it is but common speech to say that the keeper must pay the damages. Yet if he properly secures the dog, and without his privity another person comes along and lets it loose, he is not liable.² A mist like that thus explained has dimmed the truth of the law in a few of the cases as to —

§ 1236. **Contributory Negligence.** — Contrary to some exceptional passages in the books, the doctrine of reason is sufficiently affirmed by authority, that contributory negligence will defeat the injured person's action.³ Thus, one who without cause or provocation kicks a dog cannot complain if it repels the aggression.⁴ But the mere familiarity of offering a piece of candy to a dog not known by him to be vicious, will not, as contributory negligence, bar the action for an injury received in return.⁵ A sort of contributory negligence is a —

§ 1237. **Trespass on Owner's Premises.** — Within the principle that men need not keep their premises safe for trespassers, yet must not inflict even on them a wanton injury,⁶ one who goes without right upon land of another, and is there bitten by a ferocious dog of the owner, may have damages or not according to the nature of the particular case. The elucidations in preceding chapters will guide the reader, yet a reference to a few of the decisions will be helpful.⁷

§ 1238. **Trespass by Dogs.** — One of the advantages of owning an ordinarily disposed dog instead of a horse appears to be, that, while the horse-owner must use care to keep his animal from injuring a neighbor by a trespass,⁸ the dog-owner is under no corresponding duty. So long as the dog avoids getting a bad name, its owner, unlike the horse-owner, escapes

¹ *Goode v. Martin*, 57 Md. 606.

² *Fleeming v. Orr*, 2 Macq. H. L. Cas. 14.

³ *Williams v. Moray*, 74 Ind. 25; *Wormley v. Gregg*, 65 Ill. 251; *Mera-
cle v. Down*, 64 Wis. 323; *Muller v.
McKesson*, 73 N. Y. 195, 200, 201; *Curtis v. Mills*, 5 Car. & P. 489.

⁴ *Keightlinger v. Egan*, 65 Ill. 235.

⁵ *Lynch v. McNally*, 73 N. Y. 347.

⁶ Ante, § 845-847, 1036, 1048, 1051, 1094, 1097.

⁷ *Loomis v. Terry*, 17 Wend. 496; *Sherfey v. Bartley*, 4 Sneed, Tenn. 58; *Ilott v. Wilkes*, 3 B. & Ald. 304, 313; *Woolf v. Chalker*, 31 Conn. 121; *Pierret v. Moller*, 3 E. D. Smith, 574; *Sarch v. Blackburn*, Moody & M. 505, 4 Car. & P. 297.

⁸ Ante, § 1226; *McIlvaine v. Lantz*, 4 Out. Pa. 586.

all obligation to pay for the mischief it does if suffered to wander without its master abroad.¹ But if the master is present, himself trespassing, he must pay as well for the dog as for himself.²

§ 1239. **Stealing or Killing Dog.**—Says a learned judge: "At common law, property in a dog, though recognized, has always been held to be 'base,' inferior, and entitled to less regard and protection than property in other domestic animals."³ Therefore it is no offence at common law to steal a dog.⁴ But it is actionable to take it from its owner by trespass, or withhold it from him, or kill it without a special excuse.⁵ If a dog at large has by its vicious conduct or by disease become a public nuisance, it may, at least by the better doctrine,⁶ be by any person killed.⁷ Of course, one may kill a dog in self-defence, for so he may a map.⁸ Or, he may do it in defence of his animals or other property.⁹ One dog attacking another, or worrying cattle, may be killed only if they cannot otherwise be parted.¹⁰ But the mere suspicion that a trespassing dog is about to injure animals or do other like mischief will not justify the killing.¹¹ It has been deemed that a negligent injury to a dog, in distinction from a purposed one, is not actionable.¹²

§ 1240. **Statutes,**—in some of the States, have more or less modified the common-law doctrines. The practitioner should

¹ *Brown v. Giles*, 1 Car. & P. 118; *Lowell v. Gathright*, 97 Ind. 313; *Bins-
Mason v. Keeling*, 1 Ld. Raym. 606, tead v. Buck, 2 W. Bl. 1117; *Sandys
608*; *Mitten v. Faudrye*, Popham, 161; v. Hodgson, 10 A. & E. 472.
s. c. nom. Millen v. Fawtreay, W. Jones, ⁶ Ante, § 430-432.
131; *Buck v. Moore*, 35 Hun, 338. See ⁷ 1 Bishop Crim. Law, § 1080, note.
Beckwith v. Shordike, 4 Bur. 2092. ⁸ Ante, § 944.
But see the majority opinion in *Chunot* ⁹ *Barrington v. Turner*, 3 Lev. 28;
v. Larson, 43 Wis. 536. *Wadhurst v. Damme*, Cro. Jac. 45;
v. Van Leuven v. Lyke, 1 Comst. 515, *Brown v. Hoburger*, 52 Barb. 15.

² *Van Leuven v. Lyke*, 1 Comst. 515, ¹⁰ *Wright v. Ramscot*, 1 Saund. 84;
517; *Beckwith v. Shordike*, 4 Bur. s. c. nom. *Wright v. Wraincott*, 1 Lev.
2092, 2094; *Woolf v. Chalker*, 31 Conn. 216; *Hinckley v. Emerson*, 4 Cow. 351.
121; *Green v. Doyle*, 21 Ill. Ap. 205. ¹¹ *Brent v. Kimball*, 60 Ill. 211;
And see *Chunot v. Larson*, 43 Wis. *Livermore v. Batchelder*, 141 Mass. 179.

³ *Butler, J. in Woolf v. Chalker*, 31 *See Marshall v. Blackshire*, 44 Iowa,
Conn. 121, 127. 475.

⁴ 2 Bishop Crim. Law, § 773.

⁵ *Wright v. Ramscot*, 1 Saund. 84; ¹² *Jemison v. Southwestern Rld.* 75
Ga. 444.

look carefully into those of his own State, but it would not comport with the plan of this volume to set out here the various provisions and their interpretations. A few of the cases are referred to in the note.¹

§ 1241. *The Doctrine of this Chapter restated.*

Dogs hold a special position in the law, differing in a measure from that of any other animals or things. They are of a mixed wild and tame nature, and are partly property and partly not. Out of considerations like these grow the peculiarities of the law of dogs. The details need not be repeated.

¹ *Chunot v. Larson*, 43 Wis. 536; *East Kingston v. Towle*, 48 N. H. 57; *Hurd v. Chesley*, 55 N. H. 21; *Lowell v. Gathright*, 97 Ind. 313; *Uhlein v. Cromack*, 109 Mass. 273; *Schaller v. Connors*, 57 Wis. 321; *Wilton v. Weston*, 48 Conn. 325; *Trompen v. Verhage*, 54 Mich. 304; *Hale v. Van Dever*, 67 Mo. 732; *Swift v. Applebone*, 23 Mich. 252; *Rowe v. Bird*, 48 Vt. 578; *Grant v. Ricker*, 74 Maine, 487; *Prescott v. Knowles*, 62 Maine, 277; *Quimby v. Woodbury*, 63 N. H. 370; *Remele v. Donahue*, 54 Vt. 555; *Elliott v. Herz*, 29 Mich. 202; *Denison v. Lincoln*, 131 Mass. 236; *Van Horn v. People*, 46 Mich. 183; *Faribault v. Wilson*, 34 Minn. 254; *The State v. Topeka*, 36 Kan. 76; *Jones v. Sherwood*, 37 Conn. 466; *Miller v. Spaulding*, 41 Wis. 221; *Carroll v. Weiler*, 4 *Thomp. & C.* 131, 1 Hun, 605; *Kerr v. O'Connor*, 13 Smith, Pa. 341; *Slinger v. Henneman*, 38 Wis. 504; *Wright v. Clark*, 50 Vt. 130.

CHAPTER LIV.

HUNTING AND FISHING.

§ 1242, 1243. Introduction.

1244-1252. Hunting.

1253-1256. Fishing.

1257. Doctrine of Chapter restated.

§ 1242. **Elsewhere.** — This subject, in its criminal-law aspect, and particularly as to the larceny of wild animals and fish, and statutes for the protection of fish and game, with various related topics, is fully explained by the author in his series of works on the law of crimes. Hence, —

§ 1243. **What for this Chapter and how divided.** — We shall not in this chapter enter into the subject with much minuteness of detail. The general doctrines will be given as to, I. Hunting; II. Fishing.

I. *Hunting.*

§ 1244. **Nature of Subject — Difficulties.** — There are diversities in the animals — a word which includes birds¹ — pursued and caught by man for his amusement or profit. So that what would be a proper rule for one wild creature would not necessarily be such for another of a different nature or sort. And there is a difference between lands wholly uncared-for and uninhabited, the ownership whereof is little more than nominal, and lands which, though unploughed, or wooded, are kept for what can be got out of them in the present time. So that a hunting on the former might be looked upon as different from the same thing on the latter. And rules adapted to a country like England, by the policy of whose legislation the

¹ Bishop Stat. Crimes, § 1104.

rich are given hunting privileges denied to the poor, may not be adapted to a republic like ours, the glory of which is that the rich and the poor stand before the law on one level. Again, it is settled both in our States and in England, that there may be, in wild animals, an ownership which will sustain a civil action, but not an indictment for the larceny of them.¹ On these several questions we in this country have had but little litigation, — quite too little to enable an author to set down many doctrines on any firm basis of authority. As to the —

§ 1245. **Ownership.** — Speaking without reference to some nice distinctions between different species of wild creatures,² an animal *feræ naturæ* is, in its unreclaimed state, nobody's property. Killed, caged, or tamed, it is for most purposes the property of him who has thus obtained dominion over it.³ And thus we see how and why the hunter is entitled to the game which he entraps or kills. Still, —

§ 1246. **As to Ownership of Land.** — Under the common law of England, the ownership of the soil carries with it a not well defined right or *quasi* ownership in the wild animals thereon; which, in general terms, may be said to be an exclusive privilege of reducing them to property. Therefore, in England, the rule from early times has been and is, that he who, in a trespass on the land of another, kills a wild animal there found, acquires in it no property as against the landowner; but the latter takes the ownership in it by virtue of his ownership of the soil.⁴ Yet if, instead, the trespasser chases, still in trespass, the animal to the land of another person and kills it thereon, he takes the ownership of it as his own,⁵ — a proposition upon which a later case appears to have cast some doubt.⁶ Now, —

¹ 2 Bishop Crim. Law, § 771-779.

² *Ib.*, at several places.

³ *Ib.*; Bishop Stat. Crimes, § 1133, 2 Kent Com. 348-350; *Buster v. Newkirk*, 20 Johns. 75; *Ulery v. Jones*, 81 Ill. 403; *Fines v. Spencer*, 3 Dyer, 306 b; *Amory v. Flynn*, 10 Johns. 102.

⁴ *Sutton v. Moody*, 1 Ld. Raym. 250, 5 Mod. 375, 12 Mod. 144, 2 Salk. 556;

Lonsdale v. Rigg, 11 Exch. 654; *Rigg v. Lonsdale*, 1 H. & N. 923; *Blades v. Higgs*, 12 C. B. N. s. 501, 8 Jur. N. s. 1012, 13 C. B. N. s. 844, 9 Jur. N. s. 1040, 11 H. L. Cas. 621, 11 Jur. N. s. 701, 20 C. B. N. s. 214.

⁵ *Churchward v. Studdy*, 14 East, 249.

⁶ *Blades v. Higgs*, *supra*, in the

§ 1247. **With us**, — the questions thus stated appear not to have been much considered ; yet it has probably not often occurred to hunters that the owner of the soil can lawfully deprive them of the game they kill. And even as to the trespass, we have a judicial ruling that one cannot prevent others from hunting animals *feræ naturæ* on his unenclosed and uncultivated lands.¹ But, unless in exceptional circumstances, or by force of some local law, the land-owner's control over his estate is, it is believed, not commonly deemed to be thus intermittent. And if we accept this ruling, still it does not extend to cultivated grounds, or to fenced woods, or probably to lands kept in any way for present profit and use.² And, —

§ 1248. **Trespass**. — In general, the cases both ancient and modern agree in holding, that one who without leave goes upon another's premises³ to hunt commits an actionable trespass.⁴ Doubtless there is, certainly there ought to be, an exception in favor of the destruction of those dangerous wild animals which are a universal dread and common nuisance.⁵ It was even the earlier doctrine in England, "settled," said Lord Mansfield, "by all the cases as far back as in the reign of Hen. VIII.," that "a man may follow a fox into the grounds of another."⁶ But the contrary has more recently been declared to be "the true view of the law ; namely, that a person has no right, in the pursuit of the fox as a sport, to come upon the land of another against his will."⁷ Now, —

House of Lords. *Sutton v. Moody*, supra, is the authority upon which the later adjudications proceed. There Holt, C. J. at p. 251 of 1 Ld. Raym. states the doctrine, as derived from the Year Books, thus : "If A starts a hare in the ground of B and hunts it, and kills it there, the property continues all the while in B. But if A starts a hare in the ground of B and hunts it into the ground of C and kills it there, the property is in A the hunter ; but A is liable to an action of trespass for hunting in the grounds as well of B as of C." And see what appears to be another *Sutton v. Moody*, 12 Mod. 145.

¹ *McConico v. Singleton*, 2 Mill,

244 ; *Broughton v. Singleton*, 2 Nott & McC. 338.

² Ante, § 1244 ; *Fripp v. Hasell*, 1 Strob. 173.

³ Ante, § 13, 30, 101, 819, 823, 830.

⁴ Ante, § 1246, note ; *Fripp v. Hasell*, 1 Strob. 173 ; *Deane v. Clayton*, 7 Taunt. 489.

⁵ But see, as apparently contra, *Glenn v. Kays*, 1 Bradw. 479. Compare with ante, § 430-432 ; and the opinions in *Paul v. Summerhayes*, 4 Q. B. D. 9.

⁶ *Gundry v. Feltham*, 1 T. R. 334, 337.

⁷ *Paul v. Summerhayes*, supra, at p. 12, opinion of Coleridge, C. J.

§ 1249. **Consequences of Trespass.** — Should we reject the English doctrine that ownership in land draws to it the ownership in wild animals killed upon it in trespass,¹ still it seems reasonable to hold, in analogy to a rule stated in the last chapter,² that, when a hunter is sued for his trespass upon the land, the damages will be augmented if he is shown to have carried away animals which the land-owner might have turned into value.

§ 1250. **Bees** — are wild animals; but, like many others, they may be domesticated, and then they are the property of those having dominion over them. And, if they escape, the owner may pursue and retake them.³ There is something like authority for saying that, if they dwell wild in a tree in the woods, they belong to the owner of the soil.⁴ As to this sort of question, there is certainly ground to distinguish between them and animals of natures differing from theirs;⁵ at least, their honey, adhering to a tree, might well be deemed the property of the tree-owner. And one who, in trespass, cuts down the tree and takes the honey away, is answerable in damages.⁶ A stranger, by marking a bee-tree which he finds, acquires no right thereto.⁷

§ 1251. **Hunter's Rights attaching.** — Mere pursuit of a wild animal gives the pursuer no property in it. His rights attach only when, in some way, such as by wounding, killing, entrapping, or surrounding it, he acquires over it dominion.⁸

§ 1252. **Statutes** — prevail in some of the States, regulating the killing of wild animals. The reader is presumed to have examined those of his own State.

II. *Fishing.*

§ 1253. **Wild — Ownership.** — Fish, in their unreclaimed condition, are within the same reason as wild animals.⁹

¹ Ante, § 1246.

² Ante, § 1238; post, § 1253.

³ *Gillet v. Mason*, 7 Johns. 16; *Merrils v. Goodwin*, 1 Root, 209; *Goff v. Kilts*, 15 Wend. 550.

⁴ *Ferguson v. Miller*, 1 Cow. 243; *Goff v. Kilts*, supra. See *Wallis v. Mease*, 3 Binn. 546.

⁵ Ante, § 1244.

⁶ *Merrils v. Goodwin*, supra.

⁷ *Gillet v. Mason*, supra.

⁸ *Pierson v. Post*, 3 Caines, 175; *Buster v. Newkirk*, 20 Johns. 75.

⁹ Ante, § 1245.

Caught, they are property ; in their native waters, unconfined, they are not.¹ In those non-navigable waters, the ownership whereof is in the proprietor of the adjacent shores, they are, while unreclaimed, sometimes spoken of in our books as the "property" of the land-owner, or owner of the fishery, and subjects for the action of trespass.² But it is believed to be more accurate to assign to them the status, whatever it is,³ of wild animals in respect of the owner of the soil. So that, if one takes "wild" fish in private waters, his technical wrong is the trespass to the land, and his carrying away of the fish is the aggravation explained as to game.⁴

§ 1254. **Fishing in Navigable Waters.** — In the absence of any contrary statute, contract, or otherwise, all persons have the right to take fish in all navigable waters, whether ocean, bay, or river.⁵ But they cannot, as a help thereto, appropriate any portion of the adjoining lands, or pass over them to the fishing waters.⁶ But —

§ 1255. **Non-navigable.** — The non-navigable streams belong to the adjoining owners ; so that any person who, without their consent, goes upon them or their banks to fish, is a trespasser.⁷ Now, —

§ 1256. **Statutes — Grants — Prescriptions, &c.** — By legislative enactments, grants, prescriptions, and other means, particular fishery rights in individuals and corporations, variant from the above, and differing in our respective States, have been created. A pursuit of the subject over the ground thus indicated would take us outside the sphere of the present volume.

¹ 2 Bishop Crim. Law, § 773, 775.

² Washb. Easms. 420, referring to *Collins v. Benbury*, 5 Ire. 118 ; *Smith v. Kemp*, 2 Salk. 637 ; *Holford v. Bailey*, 13 Q. B. 426.

³ Ante, § 1246-1250.

⁴ Ante, § 1249.

⁵ Bishop Stat. Crimes, § 1128 ; *Warren v. Matthews*, 1 Salk. 357 ; *Orford v. Richardson*, 4 T. R. 437 ; *Carter v. Murcot*, 4 Bur. 2162 ; *Martin v. Waddell*, 16 Pet. 367, 412, 414 ; *Hooker v.*

Cummings, 20 Johns. 90 ; *Gould v. James*, 6 Cow. 369, 376 ; *Rogers v. Jones*, 1 Wend. 237 ; *Ward v. Creswell*, Willes, 265 ; *Chalker v. Dickinson*, 1 Conn. 382 ; *Weston v. Sampson*, 8 Cush. 347.

⁶ *Coolidge v. Williams*, 4 Mass. 140 ; *Cortelyou v. Van Brundt*, 2 Johns. 357.

⁷ Ante, § 1253 ; Bishop Stat. Crimes, § 1128 ; *Carter v. Murcot*, 4 Bur. 2162, 2164.

§ 1257. *The Doctrine of this Chapter restated.*

Wild animals and fish, in their unreclaimed state, resemble our natural, flowing waters. Such waters are the property of nobody in particular, yet each individual may appropriate, in an orderly manner, and with a due regard for others, what he can use of them.¹ But the manner of appropriation is not in the two cases the same. There does not appear to have been discovered, otherwise than through legislation, any limit to the right of one to take fish and game, as depriving another of his share. The common law draws the line where trespass begins. No man may, without leave, go upon land of another to fish or hunt. The ordinary, or non-legal, course of things in our country is not quite so, but such is the common law which, only in rare and exceptional instances, if at all, has been changed by statutes.

¹ Ante, § 890.

CHAPTER LV.

SPORTS, PASTIMES, AND PUBLIC EXHIBITIONS AND PERFORMANCES.

§ 1258. **What for this Chapter.** — It is not proposed, in this chapter, to enter into a separate discussion of the various topics embraced within its title; but chiefly, by way of review, to direct attention to elucidations already given.

§ 1259. **Hunting and Fishing** — are sports and pastimes explained in the last chapter.

§ 1260. **Public Ways.** — How the public ways may be employed for purposes other than business travel is shown in a chapter further back.¹

§ 1261. **Shows, Theatricals, and other Public Amusements** — are commonly permitted only under license from the municipal corporation.² But its license to a circus does not place it under any new obligations for the safety of the ways to and from the place of performance.³

§ 1262. **Management of Place.** — Within principles already developed,⁴ a person giving any sort of entertainment must render the place safe for his patrons, direct and arrange their seating or standing; and, when necessary, expel any who will not conform to the reasonable rules.⁵ An immoral or otherwise disorderly or corrupting public show is indictable at the common law.⁶

¹ Ante, § 985, 987, 993, 1008-1011, 1014.

² Bishop Dir. & F. § 1000; 1 Dil. Mun. Corp. § 291, 294; Boston v. Schaffer, 9 Pick. 415; Commonwealth v. Twitchell, 4 Cush. 74; Smith v. Madison, 7 Ind. 86; Hodges v. Nashville, 2 Humph. 61; Pike v. The State, 53 Ala. 419.

³ Morgan v. Hallowell, 57 Maine, 375.

⁴ Ante, § 846, 848, 851-854, 1086, 1090, 1091, 1097, 1100, 1106, 1115, 1119.

⁵ Commonwealth v. Powell, 10 Philad. 180.

⁶ 1 Bishop Crim. Law, § 500, 504, 1145, 1146.

§ 1263. **Audience.** — How, at a theatre or other meeting, the audience should behave, is explained in another place.¹

§ 1264. **Sports** — are either lawful or unlawful. We have had illustrations of both sorts, and of the consequences.²

§ 1265. **Martial Sports,** — though not without their dangers, should and do receive a special protection from the law, in consideration of their benefits in preparing men for the defence of the country. But to disturb a judicial tribunal by a military parade is a contempt of court.³

§ 1266. *The Doctrine of this Chapter restated.*

Innocent recreations, amusements, and sports are not discountenanced but rather encouraged by the law. In all their aspects, they are treated as lawful. At the same time, they are proper and common subjects of regulation by statutes and municipal ordinances. Dangerous, corrupting, and otherwise evil sports and amusements receive no favor from the law, and some of them are even indictable. Still, in proper circumstances,⁴ a mere useless sport or entertainment will be regarded by the courts with less favor than a useful occupation. These principles, operating in connection with the common rules of law regulating other affairs, and applied to the statutes and ordinances which concern the particular subject, will disclose the rule whereby each individual question within this chapter is to be decided.

¹ 1 Bishop Crim. Law, § 542; 2 Ib. 359, 421, 752, 987, 993, 1008-1011, § 308-310 *α*. And see ante, § 359. 1014.

² Ante, § 64, 195, 196, 202, 321, ³ 2 Bishop Crim. Law, § 252.

⁴ Ante, § 421.

CHAPTER LVI.

DEATH.

§ 1267. Introduction.

1268-1270. At the Common Law.

1271-1273. Under Statutes.

1274. Doctrine of Chapter restated.

§ 1267. **How Chapter divided.** — We shall consider this subject as to, I. At the Common Law ; II. Under Statutes.

I. *At the Common Law.*

§ 1268. **General.** — The sphere of the present work not extending to judicial procedure, it will satisfy the purposes of this brief chapter to say that the common law, as ordinarily expounded, not speaking of some doubts and nice distinctions, does not recognize the taking of life as a ground for damages to any living person.¹ And there can be no suit for mutilating a dead body.² But, —

§ 1269. **Life after Injury.** — If a period of time intervenes between the fatal injury and the death, an action will lie for what was suffered during life, yet not for the death.³ Now, —

¹ Wyatt v. Williams, 43 N. H. 102, 105; Osborn v. Gillett, Law Rep. 8 Ex. 88; Spring v. Glenn, 12 Bush, 172; Holland v. Lynn, &c. Rld. 144 Mass. 425; Lyons v. Woodward, 49 Maine, 29; Carey v. Berkshire Rld. 1 Cush. 475; Smith v. Sykes, Freeman, 224; Higgins v. Butcher, Yelv. 89; Baker v. Bolton, 1 Camp. 493; Chicago, &c. Rld. v. Schroeder, 18 Bradw. 328; Scheffler v. Minneapolis, &c. Ry. 32 Minn. 125; Dawkes v. Coveleigh, Style, 346; Cooper v. Witham, 1 Lev. 247, 1 Sid. 375; Sherman v. Johnson, 58 Vt. 40.

² Griffith v. Charlotte, &c. Rld. 23 S. C. 25.

³ Baker v. Bolton, 1 Camp. 493; Conner v. Paul, 12 Bush, 144; Kellow v. Central Iowa Ry. 68 Iowa, 470; Natchez, &c. Rld. v. Cook, 63 Missis. 38; Green v. Hudson River Rld. 28 Barb. 9; Eden v. Lexington, &c. Rld. 14 B. Monr. 204; Lucas v. New York Cent. Rld. 21 Barb. 245.

§ 1270. **In Reason**, — at the present day, however logical these technical rules may have been when established, the killing of one, though not admitting of compensation by anything to be conveyed to him in the land where earth is no more, often or commonly brings pecuniary damage to persons left behind. Hence, —

II. Under Statutes.

§ 1271. **General**. — At the present time, there are in most or all of our States statutes, varying in their forms, under which the living may in particular circumstances or commonly enforce a pecuniary recompense for the death. It would not accord with the plan of this work to enter into their differing details. Some of the later cases under them are cited in the note.¹

¹ *United States*. — *Mobile Life Ins. Co. v. Brame*, 95 U. S. 754.

Alabama. — *Luke v. Calhoun*, 52 Ala. 115; *King v. Henkie*, 80 Ala. 505.

Arkansas. — *Texas, &c. Ry. v. Orr*, 46 Ark. 182.

California. — *Leahy v. Southern Pac. Rld.* 65 Cal. 150.

Colorado. — *Kansas Pac. Ry. v. Miller*, 2 Colo. 442.

Connecticut. — *Murphy v. New York, &c. Rld.* 30 Conn. 184.

Florida. — *Louisville, &c. Rld. v. Yniestra*, 21 Fla. 700.

Georgia. — *Bell v. Wooten*, 53 Ga. 684; *Allen v. Atlanta Street Rld.* 54 Ga. 503; *Miller v. Southwestern Rld.* 55 Ga. 143; *Cottingham v. Weekes*, 56 Ga. 201; *Georgia Rld. &c. Co. v. Garr*, 57 Ga. 277; *Weekes v. Cottingham*, 58 Ga. 559; *Berry v. Northeastern Rld.* 72 Ga. 137; *East Tennessee, &c. Rld. v. Hartley*, 73 Ga. 5; *Georgia Rld. v. Pittman*, 73 Ga. 325.

Illinois. — *Chicago, &c. Rld. v. Austin*, 69 Ill. 426; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Chicago, &c. Rld. v. Harwood*, 80 Ill. 88; *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; *Chicago v.*

Keefe, 114 Ill. 222; *Chicago, &c. Ry. v. Carey*, 115 Ill. 115; *Stafford v. Rubens*, 115 Ill. 196; *Chicago, &c. Rld. v. O'Connor*, 119 Ill. 586; *Chicago, &c. Ry. v. Thorson*, 11 Bradw. 631; *Gardner v. Chicago, &c. Ry.* 17 Bradw. 262; *Wehr v. Brooks*, 21 Ill. Ap. 115.

Indiana. — *Jeffersonville, &c. Rld. v. Riley*, 39 Ind. 568; *Ream v. Pittsburgh, &c. Rld.* 49 Ind. 93; *Long v. Doxey*, 50 Ind. 385; *Cincinnati, &c. Rld. v. Eaton*, 53 Ind. 307; *Evansville, &c. Rld. v. Wolf*, 59 Ind. 89; *Binford v. Johnston*, 82 Ind. 426; *Terre Haute, &c. Rld. v. Buck*, 96 Ind. 346; *Stewart v. Terre Haute, &c. Rld.* 103 Ind. 44; *Mayhew v. Burns*, 103 Ind. 328; *Louisville, &c. Ry. v. Thompson*, 107 Ind. 442; *Fort Wayne, &c. Ry. v. Beyerle*, 110 Ind. 100.

Iowa. — *Shoemaker v. Lacey*, 38 Iowa, 277; *Beems v. Chicago, &c. Ry.* 67 Iowa, 435; *Armil v. Chicago, &c. Ry.* 70 Iowa, 130.

Kansas. — *Kansas Pac. Ry. v. Salmon*, 14 Kan. 512; *Kansas Pac. Ry. v. Cutter*, 19 Kan. 83; *St. Joseph, &c. Rld. v. Wheeler*, 35 Kan. 185.

Kentucky. — *Covington Street Ry.*

§ 1272. **The Right to Recover** — under these statutes is, if the right of action is given, ordinarily limited to those cases

v. Packer, 9 Bush, 455; *Hansford v. Payne*, 11 Bush, 380; *Spring v. Glenn*, 12 Bush, 172; *Morgan v. Thompson*, 82 Ky. 383.

Louisiana. — *McCubbin v. Hastings*, 27 La. An. 713.

Maine. — *Hobbs v. Eastern Rld.* 66 Maine, 572.

Maryland. — *Northern Cent. Ry. v. The State*, 31 Md. 357; *The State v. Pittsburgh, &c. Rld.* 45 Md. 41.

Massachusetts. — *Commonwealth v. Boston, &c. Rld.* 121 Mass. 36; *Kelley v. Boston, &c. Rld.* 135 Mass. 448; *Dietrich v. Northampton*, 138 Mass. 14; *Merrill v. Eastern Rld.* 139 Mass. 238; *Davis v. New York, &c. Rld.* 143 Mass. 301; *Holland v. Lynn, &c. Rld.* 144 Mass. 425; *Doyle v. Boston, &c. Rld.* 145 Mass. 386; *Granger v. Boston, &c. Rld.* 146 Mass. 276.

Michigan. — *Chicago, &c. Ry. v. Bayfield*, 37 Mich. 205; *Beauchamp v. Saginaw Min. Co.* 50 Mich. 163; *Staal v. Grand Rapids, &c. Rld.* 57 Mich. 239; *Guggenheim v. Lake Shore, &c. Ry.* 57 Mich. 488; *Klanowski v. Grand Trunk Ry.* 57 Mich. 525; *Sheldon v. Flint, &c. Rld.* 59 Mich. 172.

Minnesota. — *Scheffler v. Minneapolis, &c. Ry.* 32 Minn. 125; *Robel v. Chicago, &c. Ry.* 35 Minn. 84.

Mississippi. — *Illinois Cent. Rld. v. Crudup*, 63 Missis. 291; *Amos v. Mobile, &c. Rld.* 63 Missis. 509; *Vicksburg, &c. Rld. v. Phillips*, 64 Missis. 693.

Missouri. — *Matthews v. St. Louis Grain Elev.* 59 Mo. 474; *Proctor v. Hannibal, &c. Rld.* 64 Mo. 112; *White v. Maxcy*, 64 Mo. 552; *Nagel v. Missouri Pac. Ry.* 75 Mo. 653; *Rutter v. Missouri Pac. Ry.* 81 Mo. 169; *Scoville v. Hannibal, &c. Rld.* 81 Mo. 434; *Gibbs v. Hannibal*, 82 Mo. 143; *Philpott v. Missouri Pac. Rld.* 85 Mo. 164; *Grogan v. Broadway Foundry*, 87 Mo. 321; *Jackson v. St. Louis, &c. Ry.* 87

Mo. 422; *Spiva v. Osage Coal, &c. Co.* 88 Mo. 68; *Carroll v. Missouri Pac. Ry.* 88 Mo. 239; *Barker v. Hannibal, &c. Rld.* 91 Mo. 86; *Stoher v. St. Louis, &c. Ry.* 91 Mo. 509; *Hickman v. Missouri Pac. Ry.* 22 Mo. Ap. 344.

New Hampshire. — *The State v. Boston, &c. Rld.* 58 N. H. 408; *Corliss v. Worcester, &c. Rld.* 63 N. H. 404.

New Jersey. — *Demarest v. Little*, 18 Vroom, 28.

New York. — *Norris v. Kohler*, 41 N. Y. 42; *Ihl v. Forty-second Street, &c. Rld.* 47 N. Y. 317; *Sauter v. New York Cent. &c. Rld.* 66 N. Y. 50; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48; *Quinn v. Power*, 87 N. Y. 535; *Durkin v. Sharp*, 88 N. Y. 225; *Harvey v. New York Cent. &c. Rld.* 88 N. Y. 481; *Hegerich v. Keddle*, 99 N. Y. 258; *Olive v. Whitney Marble Co.* 103 N. Y. 292; *Woodard v. New York, &c. Rld.* 106 N. Y. 369.

North Carolina. — *Warner v. Western North Carolina Rld.* 94 N. C. 250; *Taylor v. Cranberry Iron, &c. Co.* 94 N. C. 525.

Ohio. — *Cleveland, &c. Rld. v. Crawford*, 24 Ohio State, 631; *Grottenkemper v. Harris*, 25 Ohio State, 510; *Hover v. Pennsylvania Co.* 25 Ohio State, 667; *Weidner v. Rankin*, 26 Ohio State, 522; *Steel v. Kurtz*, 28 Ohio State, 119.

Pennsylvania. — *Gray v. Scott*, 16 Smith, Pa. 345; *West Chester, &c. Rld. v. McElwee*, 17 Smith, Pa. 311; *Huntingdon, &c. Rld. v. Decker*, 3 Norris, Pa. 419; *Philadelphia, &c. Rld. v. Boyer*, 1 Out. Pa. 91.

Tennessee. — *Nashville, &c. Rld. v. Smith*, 6 Heisk. 174; *Collins v. East Tennessee, &c. Rld.* 9 Heisk. 841; *Traf-ford v. Adams Express*, 8 Lea, 96; *Chi-cago, &c. Rld. v. Pounds*, 11 Lea, 127; *Chesapeake, &c. Rld. v. Higgins*, 85 Tenn. 620.

Texas. — *Houston, &c. Ry. v. Brad-ley*, 45 Texas, 171; *March v. Walker*,

wherein the deceased person could have maintained a suit for the injury had he survived.¹ Thus, —

§ 1273. **Contributory Negligence** — is, under most of the statutes, as judicially construed, a bar to the action.² But there are exceptions.³

§ 1274. *The Doctrine of this Chapter restated.*

By an old rule of the common law, which, whether founded in reason at the time it was established or not, has now become quite technical, there can be no suit for the killing of a person. But during later years statutes have been widely established, in one form or another, giving the action. And we have some statutes under which there may be an indictment for the recovery of money to be paid to the relatives or heirs of the deceased person. It is, in effect, a civil proceeding in criminal form.⁴

48 Texas, 372; East Line, &c. Ry. v. Smith, 65 Texas, 167; Texas, &c. Rld. v. Berry, 67 Texas, 238; Hughes v. Galveston, &c. Ry. 67 Texas, 595.

Vermont. — Sherman v. Johnson, 58 Vt. 40.

Virginia. — Baltimore, &c. Rld. v. Wightman, 29 Grat. 431.

West Virginia. — Dimmey v. Wheeling, &c. Rld. 27 W. Va. 32.

Wisconsin. — Freeman v. Engelmann Transp. Co. 36 Wis. 571; Ewen v. Chicago, &c. Ry. 38 Wis. 613; Johnson v. Chicago, &c. Ry. 64 Wis. 425; Lawson v. Chicago, &c. Ry. 64 Wis. 447; Hoye v. Chicago, &c. Ry. 67 Wis. 1; Mulcairns v. Janesville, 67 Wis. 24; Annas v. Milwaukee, &c. Rld. 67 Wis. 46.

¹ Quincy Coal Co. v. Hood, 77

Ill. 68. See Reget v. Bell, 77 Ill. 593.

² Berry v. Northeastern Rld. 72 Ga. 137; Annas v. Milwaukee, &c. Rld. 67 Wis. 46; Freeman v. Engelmann Transp. Co. 36 Wis. 571; Hughes v. Galveston, &c. Ry. 67 Texas, 595; Gray v. Scott, 16 Smith, Pa. 345; Woodard v. New York, &c. Rld. 106 N. Y. 369; Matthews v. St. Louis Grain Elev. 59 Mo. 474; Granger v. Boston, &c. Rld. 146 Mass. 276; Shoemaker v. Lacey, 38 Iowa, 277; Ream v. Pittsburgh, &c. Rld. 49 Ind. 93; Leahy v. Southern Pac. Rld. 65 Cal. 150.

³ Merrill v. Eastern Rld. 139 Mass. 252; Nashville, &c. Rld. v. Smith, 6 Heisk. 174.

⁴ Bishop Stat. Crimes, § 467-470; Bishop Dir. & F. § 531.

CHAPTER LVII.

WRONGS OUT OF THE STATE OR COUNTRY.

§ 1275. **Conflict of Laws.** — The subject of this chapter pertains to what in legal language is familiarly known as the conflict of laws. The doctrine, in its larger aspect, is explained in the author's "Contracts."¹ The present chapter may be regarded as a sort of sub-title to the chapter in that work.

§ 1276. **Jurisdiction.** — It will be assumed, in these expositions, that, by service of process or otherwise, the court has obtained over the offending party the jurisdiction which would be required if the wrong were domestic instead of foreign. Without a jurisdiction, there could be no suit in either case.²

§ 1277. **Torts to Person.** — For any wrong to the person, inflicted in another State or country, — as, for assault and battery,³ or false imprisonment,⁴ — if within the condemnation of the laws both there and here, our courts will sustain a suit.⁵ And this doctrine extends to maritime torts committed in foreign waters.⁶ So —

§ 1278. **Transitory.** — All those actions which under the common-law forms of procedure are termed transitory may, with perhaps rare exceptions, be maintained in our courts though the thing complained of occurred in another State or country.⁷ Within this rule, a slander suit for words uttered

¹ Bishop Con. § 1368-1412.

⁵ Scott v. Seymour, 1 H. & C. 219, 8

² Meres v. Chrisman, 7 B. Monr. 422; Jur. n. s. 568; Seymour v. Scott, 9 Jur. Morrison v. Underwood, 5 Cush. 52; N. s. 522; Gray v. Taper-sleeve Pulley Works, 16 Fed. Rep. 436; Mississippi, &c. Rld. v. Ayres, 16 Lea, 725.

⁶ The Eagle, 8 Wal. 15; The Leon, 6 P. D. 148.

³ Watts v. Thomas, 2 Bibb, 458.

⁴ Mostyn v. Fabrigas, Cowp. 161.

⁷ It is the common-law form to lay

abroad,¹ a suit for malicious prosecution abroad,² or for a foreign trespass or other injury to personal property,³ may be maintained. But —

§ 1279. **Local — Real Estate.** — An action which the common law holds to be local⁴ cannot be founded upon a transaction in another State or country; “since,” says Gould, “no common-law court has jurisdiction of local causes arising within a foreign sovereignty.”⁵ The principal application of this doctrine is to real estate and to transactions connected therewith. In our system of jurisprudence, its tenure, transfer, and incidents are under the exclusive control of the law of the State or country wherein it is situated;⁶ while, as to personality, the like things are ordinarily, yet with some exceptions, governed by the law of the owner’s domicil.⁷ Therefore, for example, our courts have no jurisdiction of an action of trespass to land situated in another State or country,⁸ or of an action for diverting a watercourse from it.⁹ It would be contrary to sound principle to sustain in one State a suit affecting the title to realty in another, or the manner or extent of its enjoyment; for it would be an attempt of the court to interfere with the domestic affairs of a neighboring government. But we may doubt whether, in just principle, the common law does not carry the rule a little too far.¹⁰

§ 1280. **Wrongful at Place.** — If the thing complained of was not contrary to the foreign law under which it was done,

the venue, by a mere fiction, in a county of the State wherein the action is brought. *Lister v. Wright*, 2 Hill, N. Y. 320; *Northern Cent. Ry. v. Scholl*, 16 Md. 331; *Doulson v. Matthews*, 4 T. R. 503, 504; *Ackerson v. Erie Ry.* 2 Vroom, 309.

¹ *Lister v. Wright*, *supra*.

² *Hall v. Coe*, 4 Cow. 15.

³ *Collett v. Keith*, 2 East, 260; *Mason v. Warner*, 31 Mo. 508.

⁴ Gould Pl. c. 3, § 105 et seq.

⁵ *Ib.* c. 3, § 109; *Cragin v. Lovell*, 88 N. Y. 258; *Watts v. Kinney*, 23 Wend. 484.

⁶ *United States v. Fox*, 94 U. S. 315.

⁷ *Holmes v. Remsen*, 4 Johns. Ch. 460; *Turner v. Fenner*, 19 Ala. 355; *Johnson v. Copeland*, 35 Ala. 521; *Speed v. May*, 5 Harris, Pa. 91; *Hill v. Townsend*, 24 Texas, 575; *Bridgeport Bank v. New York, &c. Rld.* 30 Conn. 231; *Stent v. McLeod*, 2 McCord Ch. 354; *Hill v. Pine River Bank*, 45 N. H. 300.

⁸ *Dodge v. Colby*, 108 N. Y. 445; *Rex v. Hooker*, 7 Mod. 193; *Doulson v. Matthews*, 4 T. R. 503.

⁹ *Watts v. Kinney*, *supra*.

¹⁰ And see observations in *Whitaker v. Forbes*, 1 C. P. D. 51.

or if such law has for it a justification, our courts will not sustain the action.¹

§ 1281. **Statutory Torts**, — equally with common-law ones, are within the foregoing doctrines.² But a statute, for example, giving a right of action for bringing about the death of a person, will not be construed as applying to a wrong committed out of the jurisdiction.³ Yet if in two States there are two similar statutes, it being the rule that the remedy is governed by the *lex fori* and the right by the *lex loci*,⁴ a person injured in one State may bring his suit under its statute for a right accrued under the like statute of the other State.⁵

§ 1282. *The Doctrine of this Chapter restated.*

By the comity of nations, the courts of one country will not undertake to disturb the order of things in another. Therefore, for example, an action cannot be maintained in Massachusetts affecting the title or use of land in South Carolina. But the comity of nations permits and requires the enforcement of personal rights and duties in every State, however they may have originated in other States. Therefore for wrongs not local a suit may be maintained, without regard to the place where they originated, in any State wherein the plaintiff can find the defendant. But the procedure must conform to its ordinary course in the court of the suit; and, if the court has no procedure adapted to it,⁶ or if to enforce the right would be contrary to any law of the court or policy of the State wherein the suit is brought,⁷ it cannot be maintained.

¹ Phillips v. Eyre, Law Rep. 6 Q. B. State, 667; Stallknecht v. Pennsylvania 1; Le Forest v. Tolman, 117 Mass. 109; Rld. 53 How. Pr. 305.
Davis v. New York, &c. Rld. 143 Mass. 301; Nashville, &c. Rld. v. Eakin, 6 Coldw. 582.

² McLeod v. Connecticut, &c. Rld. 58 Vt. 727; Great Western Ry. v. Miller, 19 Mich. 305; Nashville, &c. Rld. v. Sprayberry, 9 Heisk. 852.

³ Hover v. Pennsylvania Co. 25 Ohio

⁴ Bishop Con. § 1403; Anderson v. Milwaukee, &c. Ry. 37 Wis. 321.

⁵ Boyce v. Wabash Ry. 63 Iowa, 70; Morris v. Chicago, &c. Ry. 65 Iowa, 727; Knight v. West Jersey Rld. 12 Out. Pa. 250; Stoeckman v. Terre Haute, &c. Rld. 15 Mo. Ap. 503.

⁶ Bishop Con. § 1371, 1403.

⁷ Ib. § 1378-1382; ante, § 67.

CHAPTER LVIII.

THE DOCTRINE OF THIS VOLUME RESTATED.

§ 1283. **Law** — is a part of the original constitution of this earth and its reasoning inhabitants. And the supreme law for man is, that he must follow his reason, as the only path from the darkness in which he is born to the cultivated light.

§ 1284. **The Steps of Reason** — are necessarily at first, like those of a babe in its earliest attempts to walk, feeble, uncertain, and not far-reaching. Gradually they become longer and firmer. They begin among the simple and familiar objects; as, from two apples and two more apples to four. The more difficult, yet equally plain ones, come later. At length, reason takes its flights, and travels the celestial spheres. Then, last of all, it discovers that the simple things of reason, the two and the two more apples making four, and all the reasoning processes which lie between the first steps and the great discoveries, are only notes in one grand harmony of the universe. And all is concord. While the mind was taking its first steps it had no idea of anything beyond; not a dream of the wider reason; no suspicion of the ultimate One Reason, though it may have heard the name of God.

§ 1285. **These Views** — will, on examination, be found exemplified in every department of learning and science, yet in nothing more clearly than in the common law. Thus, —

§ 1286. **The Common Law** — began in the feeblest steps of reason, so feeble that the name “reason” is ordinarily denied them. Those steps became longer and stronger, and in due time they were named reason. Thus this system of jurisprudence has received an apparent, not real, growth, until now it is of a magnitude unrivalled. More minutely, —

§ 1287. **Nature and Growth of Common Law.** — We see around us a universe, upon every part of which the Creator has made the impress of law. This earth wheels onward upon its axis in obedience to a law which man has been able to discover. But if you ascend the highest tower or mountain-peak, and in the loudest voice ask the earth why it moves thus, it can give you no answer. It does not know. In the earlier ages man did not know. Yet from the beginning it moved as it does now. Go to the seas and ask the fishes why their habits are as they are, — ask the codfish why he feeds upon the bottom, and the mackerel why he gets his food at the top and moves in schools, — ask any question of any fish and you get no answer. Yet there is not a fish that does not move in exact obedience to the laws which the Maker has impressed on its nature. Consult the birds and the beasts, and the same facts reveal themselves. Consult man, as to the laws of his being and conduct, and the result is not essentially different. He has a partially dormant and partially active power of reason. Feebly, and as in the twilight, he distinguishes between right and wrong. Yet God has impressed upon him his particular nature, the same as upon the beasts, upon the birds, upon the fishes, and upon the physical earth; and of this particular nature every act of his is a product. Ask the child why he claims a thing that has been given him as “mine,” and feels wronged and cries if his right is denied, and he cannot tell you. His nature teaches him that it is so, yet his efforts at reasoning upon the question are as futile as those of the fish.

§ 1288. Following instinct, or conscience, or whatever else we call it, — in other words, moved by impulses from the nature given by God to man, — he, while living as all must in society, establishes various customs and usages. Thereby he takes what may be termed his earlier steps in legal reasoning. After these customs and usages become universal, the court judicially notices and accepts them as law. When statutes are enacted it takes the like cognizance of them also. But it does not stop here. It extends the same consideration to opinions which have become universal and uniform, to the

teachings of science when so diffused as to be known by all men, and to whatever is understood of the nature of man and of the relations of society. Especially it takes judicial cognizance of reason, and of the fact that directly or indirectly it is the highest guide of man. It thus becomes the highest guide of the court, so that our law is denominated a "system of reason." The prior decisions are followed in subsequent causes, because reason teaches the importance of stability and uniformity.

§ 1289. But the facts of human life, while to the casual eye repeating themselves, are, when looked at more minutely, seen to be ever-changing. They resemble the growths of the physical earth. To the eye just opening a tree is a tree, and all trees are alike. Looked at more carefully the trees appear in great varieties. We have the oak, the beech, the sycamore, and so on through a very long list. All differ. Looking more minutely at the oak, we find in all the world no two trunks, no two limbs, no two leaves, no two specimens of the fruit, exactly alike. And it is so with all the other trees throughout the world. No two leaves, no two of anything else, were ever discovered precisely identical in form and appearance. To apply these views to our common law, —

§ 1290. It sometimes happens that the facts presented to the practitioner or court are the same which have transpired and have been passed upon before. But this can be only when the parties have dropped out something from their recital, as deeming it unimportant. In truth, no two sets of facts were ever absolutely identical. Hence, —

§ 1291. Viewed in these their external aspects, the old cases are not and cannot be precedents for the new ; since the old and the new differ. At the same time, the nature of man, equally with his enlightened reason, pronounces for precedent. It is precedent which has wrought the earlier and later customs, — growths of the feebler reason, not ordinarily called by this name. There is, therefore, some foundation on which precedent may rest. And, looking for it, we discover, what judicial wisdom has for ages discerned, a beautiful and harmonious something, not palpable to the physical sight, yet to

the understanding obvious and plain, called principles. This invisible something is as powerful as those unseen laws of nature which kept the physical universe in its place before science discovered them. It has ruled man, oftener than otherwise without being recognized, during his entire existence. And the only way in which it is possible for one decision to be a guide to another involving facts in any degree differing is to trace the decision to its principle, and thence pass downward to the new facts, and inquire whether or not they are within the same principle. This process is termed reasoning. And because it is reasoning from things established in the law to those not yet established it is called legal reasoning, or the reasoning of the law, — in distinction, to quote the words of Coke, from “every man’s reason.” So that the reasoning of the law is a distinct thing from the personal reasoning of an individual judge or text-writer. Hence, also, judicious judges and text-writers do not in their work proceed on their mere individual reasoning, but upon the law’s.

§ 1292. We see, therefore, that, however the people who established a custom, or the legislative body that enacted a statute, or the court that pronounced a decision, omitted to reason about it, or reasoned wrongly, still the custom, the statute, the decision, is deemed by the law to have proceeded on its just and true reason. And a knowledge of the law is simply and only a comprehension of such just and true reason. And what is termed the law’s progress or growth consists, more than in anything else, in discoveries of its just and true reasons, and in correcting old mistakes as to them. Now, —

§ 1293. In the Doctrines of this Volume, — the foregoing explanations of the common law are illustrated. At a period which we can contemplate only as lying somewhere in the dim and remote past, an untutored judicial wisdom discovered the law of our subject growing, wild and unnamed, out of the nature of man. That it understood the processes of this growth, the soil whereon it fed, its relations to other growths, or anything more of it than its practical helpfulness in adjusting quarrels among men we have no evidence. It was accepted, used, and brought down to the present time. The

writer and reader having now alike been called upon to give it a fresh examination, have discharged this duty, each after his best ability. The writer has presented the subject as it appears to him; the reader has assented or dissented, as his judgment dictated. And it is of no consequence how correct or how erroneous, whether far-sighted or short-sighted, was the view of the subject entertained by any particular judge. The short steps of reason are not antagonistic to the longer steps; and the conclusions which the workings of the nature of man force from a bench of judges who cannot or will not reason or who reason wrongly, are still commonly on examination found to be, in fact, a part of the harmony of a perfected whole. But that to which we are now directing our thoughts is, that the law — the common law — of the subject is a thing, a system, of high and pure reason, quite apart from the views entertained of it by particular courts. Thus, —

§ 1294. **Reasoning and Decision.** — In looking into the famous *Rylands and Fletcher* case, we saw how the court wrought out a correct decision as a part of reasonings subversive of fundamentals in the common law.¹ In another case, from fairly good reasoning, the court reached a wrong conclusion because it overlooked a controlling fact therein.² And this sort of thing is an imperfection inherent, not in the law, but in human nature. Even above us we have wandering stars. Now, —

§ 1295. **The Expositions of this Volume** — have shown the entire subject to be governed by fewer principles than the cases commonly assume it to be. Its reasonings, therefore, are not by the shortest steps. Herein it is not antagonistic to the short-step methods; it simply has this method of its own. An abler writer may perhaps follow with still longer steps; the vision of the present one does not discern whether this will be so or not. Should it be so, the truth will be as good then as now, that the longer steps are not antagonistic to the shorter. Nor, on the other hand, are the shorter antagonistic to the longer. As the steps are taken in this volume, —

¹ Ante, § 839 and note.

² Ante, § 1211.

§ 1296. **The Doctrine of this Subject**, — in particular circumstances somewhat modified by the special facts, is, that it is both the right and duty of every man to be active, that each is entitled to enjoy the fruits of his activity, that the activities of each must be carefully conducted with the view to avoiding injury to others, that in the event of such an injury its author will be chargeable only if it was the product of his negligence or other wrong, that damage from an inevitable accident or an overwhelming superior force is not the subject of compensation, that the law protects obedience to its behests and gives an action to any person injured by disobedience, that the foregoing rules apply as well to what one does in respect of his property as of his person, and that the various social and governmental relations must be respected and duly guarded.

§ 1297. **A Shorter**, — yet not antagonistic, expression of the doctrine is, that, in the whirl of life, each must strive to avoid injuring another; then, where this endeavor is made, whether successfully or not, every man must bear without compensation whatever sufferings or losses come to him. Rights of action proceed alone from violations of duty, never from misfortunes.

§ 1298. **Special Reasons**, — as just said, may modify the doctrine. Thus, if a man acts through a servant, the servant stands in his place. Then, however careful he was in choosing the servant, he must answer for the servant's negligence as though it were his own. This exceptional liability gives rights only to third persons, not to fellow servants.

§ 1299. **Other Illustrations**, — both of the larger doctrine and of its minor exceptions, extend throughout the volume. These will suffice to put the reader who is reviewing the work on his inquiry — the rest is for him.

CHAPTER LIX.

CONCLUSIONS AS TO THE FUTURE OF OUR LAW.

§ 1300. **Present Condition.**—Though, by a popular error, our law is assumed to have been nourished and reared by a long line of illustrious judges selected from the foremost minds of a learned profession, it is, in truth, in a large degree uncared for and untamed. If, in fact, it had been nourished and reared by anybody, it would not be as it is now. So hopeful and vigorous a birth as that of the common law was never before known. It has sucked wild berries, frolicked and slept without the care of mother or nurse, careered as the surrounding happenings called it out; and still it is vigorous, yet untutored and unkempt. The natural and mechanical sciences have progressed, and culture in other things has more and more abounded, while our uncombed and not “tailor-clothed” common law stands in its patched homespun, with the odor of the woods upon it, a despised brother in the family group of sciences. It cannot always be so. Hereupon,—

§ 1301. **The Remedy,**—long ago proposed, at first scouted, yet now popular in England and fast becoming so in the United States, is to kill it. In vain do the merciful, pointing to a long line of most illustrious services, which even in its state of nature it has rendered, plead for, at least, a preliminary trial of soap, water, and culture. Men among us have become weary of reasoning; they long to be like the brutes, free from the duty of thinking. So they send up the cry, “Kill that hated system of reasoning, the common law; substitute for it the naked command known as codification,

that the reasoning brain may relapse into its dormant condition." Let us look at this subject more minutely.

§ 1302. **Reason — Command.** — The world has yet discovered but two forms of law, doubtless the only forms possible; the one being reason, the other command. In England and the United States, the former is called the common law; on the Continent of Europe it is called the civil law, having been derived from the Roman jurists. The latter is with us termed statutory law, or code or codified law, or The Code. Of necessity, statutes to some extent mingle with and modify the common law. And a limited legislation, if just in its forms, is not inconsistent with the law of reason. Still —

§ 1303. **Statutes,** — if too plentiful, or not wisely drawn, are highly detrimental to the common law as a system of reasoning. Where, as is sometimes necessary, a statute simply changes a rule of the common law, being in structure harmonious with it, no great disturbance in the workings of the system need follow. But alien provisions, or especially those meant to supersede the common law, are more mischievous. For example, from early blunderings of English judges great evils in our judicial procedure had grown up. The need of amendment was acknowledged. In Massachusetts, it was accomplished by a few judicious strokes of the legislative pen; bringing no judicial upheaval, and only a very few scarcely noticeable questions of interpretation for the courts. The change was so quiet and so completely satisfactory — without even a ripple on the surface of things — that it was unheard outside of the State. In New York, a different method to the same sought-for end was adopted. As with a sound of trumpets, a Code was ushered in; the courts were overwhelmed and almost crushed out with questions of interpretation, "Practice Reports" in more than one series sprang up and multiplied, and with all came a crop of litigation such as was never witnessed before. Professional opinion was divided and set into a broil not yet over, the unhappy ferment travelled into some of the other States, and the end is not even now discernible. And, —

§ 1304. However imperative a statutory change may be, it is scarcely possible for it to come without some marring of the common law. The reader will see this truth strikingly illustrated on a comparison of the present volume with the author's work on "Contracts," — two products of the same mind, doubtless equal in manner and ability. The thing inherently the simpler is the contract; non-contract rights and wrongs cover a vastly wider space, and involve more numerous natural divisions. Yet, in the former work, the doctrines of reason appear at every step limited by technical rules, and complication is piled upon complication; in the present work there is very little of this, but fundamental principles in no great numbers run through and control the whole. The difference is, that contracts are regulated by various early statutes, operating in conjunction with the common law, while non-contract rights and wrongs have been very little interfered with in this way. The laws which God has made are few, simple, and sufficient. He rules the physical Universe with only two principal ones; and the supplementary minor ones can be counted on a man's fingers. He is far-seeing; man is short-sighted, therefore has thousands of laws to God's one. Hence —

§ 1305. The great and overwhelming danger to our law is the needless multiplication of statutes. And it makes no difference though the statutes are called by the name Code. Suppose, for example, the scheme which is termed codifying the common law is carried out. Thereby a contradiction has been enacted; there can be no such thing as a codified common law. The common law is reason; the code is command. The transmutation of reason into command is as complete when the thing commanded is what reason had on some previous occasion approved, as when it is not.

§ 1306. In the **Next Chapter** — this subject will be resumed, and carried forward from a wider standpoint. The foregoing sections are but introductory, and the next chapter is, while it has a separate title, a continuation also of this one.

CHAPTER LX.

CONCLUSIONS AS TO LEGAL REFORMS AND THEIR INFLUENCE ON
GOVERNMENT.

§ 1307. **Introduction.** — During a considerable number of recent years, it has been an approved custom, especially in England, for an author explaining some branch of the common law to introduce his work with a plan for destroying the common law itself by merging it in codification. Whence it has occurred to the present writer, as, at least, equally appropriate, to devote a little space to words commendatory of the system of laws which the book was written to expound. While preparing the present work, and contemplating the carrying out of this idea in it, he received an invitation to address an exceptionally intelligent assembly of legislators, judges, and practising lawyers, nominally the Bar Association of South Carolina and its guests; and, to see how the views meant for the book would impress others, he accepted the invitation, presented them in the Address,¹ and afterward they were published in a legal periodical, and in pamphlet. Partly from the flattering reception which they received from eminent persons whose prepossessions were not disturbed by them, but chiefly from the extremely high estimation entertained of them by some of our very foremost minds, advocates of codification, who deemed it a duty — not to answer them, but — to publish misrepresentations of them far and wide to the profession, he has become reluctant to change, as originally contemplated, even their form; fearing that thereby they will be rendered less effective. So, with a few alterations indicated by their different position at the end of a book, or suggested by a revision, they are here given, omitting introductory matter and a few paragraphs, as follows.

I. *Law as Embodied Reason — two Systems.*

§ 1308. **Reason.** — In the economy of human life and association, we have, as the fairest gifts of God, love, religion, and reason. I need not say that the last is the greatest, for it includes the

¹ Delivered in the Hall of Representatives, State House, at Columbia, S. C., Dec. 8, 1887.

other two. Where reason, pure and perfect, prevails, all other good dwells; and the place whence it is banished is, whether in this world or the next, hell. "Let us reason together," is the command of Him from whom both we and reason proceeded. There is false reasoning, but true reasoning conducts to all light and all happiness.

§ 1309. **Civil Law.** — During the ages of Roman prosperity and glory, the civil law grew up as a system of reasoning. It had, to employ our common-law forms of expression, its statutes and rules of court; and it had the writings of its jurists, corresponding to our treatises and commentaries. It lacked those masses of judicial decisions which overwhelm and almost crush out our reason. On the other hand, its jurists were real jurists, and not the sort of men, or theirs the sort of labor, whence have proceeded the greater number of our law treatises. And, beginning with no more authority than we accord to the books of our young lawyers seeking practice, and of our older ones who never had the capacity to acquire practice, they rose by their own merits to be the authority, and nearly the only authority except legislative. Thus the Roman law became a system of reasoning, as such, differing from ours in little else than the form of its growth and development. And as in the countries governed by the common law, so in those governed by the Roman, the statesmen and legislators were largely lawyers; that is, they were persons accustomed to reasoning upon legal, or governmental, things.

§ 1310. **Roman Government and Civil Law.** — Thus the affairs of Rome were controlled by men who, however lacking in many things, were accustomed to reasoning, and to the sort of reasoning by which alone the people could be well governed. And thus Rome grew and prospered, until she embraced the entire civilized world.

§ 1311. In this condition of things, the eternal longing and sighing for laziness, the ceaseless aspiration to be rid even of thinking, the same which has characterized man in all ages and countries, which has wrought immense mischief in our jurisprudence, and which now threatens to destroy it, prevailed. Justinian, whom it is the fashion to adore, finished the work of mischief. In connection with what we should term revising the statutes, doubtless an excellent undertaking, he collected what he chose to preserve of the writings of the jurists, altered the

excerpts as far as the new purpose required, and consigned all the remainder to eternal oblivion.¹ Having done this he changed the status of the accepted jurist writings from reason to statutes,² and made it a punishable forgery to write any juridical comments on the laws or do any jurist work. To speak metaphorically, he murdered the entire line of jurists, and forbade any jurist afterward to breathe in his dominions; he quenched, as far as he could, forever, all reasoning upon legal things. Of necessity, the ship of state, "which, though so great, and driven of fierce winds," had theretofore been kept from foundering by the "very small helm" of reason, went down, and Rome and the world were overwhelmed by centuries of darkness and woe.

§ 1312. When, out of the dust of succeeding ages, the *Corpus Juris Civilis* arose to a new life, men shut their eyes to that in it which had caused its death. It had ceased to be a statute. It was, like our common law, reason. No man heeded its inhibition of jurist work. In spite of it, continental Europe, the chief ground of its reign, has had its jurists, and they have been multiplying to the present day. And those who now sing the praises of Justinian mean, not Justinian, but the jurists whom he murdered, and who have come to life in spite of him.

§ 1313. **England.**— Let me anticipate my argument by reminding you that the world presents now an exact parallel to Rome in the days of Justinian. There is a little island upon which the angel of light as she flew over it dropped a spark. Spurning Justinian's folly, she accepted reason, named it the common law, and rose to a power and glory which mock the very brightest of Roman dreams. Her navies rule the seas, her colonies watch the sun in all his course around the world, her glory threw off in one of her flights these United States of America. But the longing for laziness has of late taken possession of her. And she threatens to substitute acts of Parliament for all her common law of reason; and make it possible for sluggards and fools to practise at her bar and preside in her courts. If she does it, it requires no gift of prophecy to foresee that her encompassing seas will weep upon the dripping rocks around that little island a more

¹ I express no opinion on the historical question, whether or not he actually burned those jurist writings which he rejected. Gibbon, c. 44, explains that, in the condition of letters then

and afterward, the absolute forbidding of their use would work a destruction without the necessity of calling in fire.

² Ante, § 1305.

mournful requiem to her entombed empire than was ever before sung over fallen greatness and glory. And —

§ 1314. **Law without Reason** — the mere naked command — has never wrought prosperity for any people.

II. *Qualifying for Governmental Work.*

§ 1315. **Necessity for.** — No man able to pay for a dwelling-house would intrust its erection to one whose only study and experience consisted in picking and shovelling gravel. And it is but common knowledge that he who would do anything well must have had some adequate training for the particular work. If governmental work is sometimes assumed to be an exception, it is only by minds overheated by party politics. And no considerate person will deny that the helm which guides the ship of state is reason, not the reason of the chemist, of the smith, or of the mathematician, but the reason of the laws and of government. Now, —

§ 1316. **The Practice or Administration of the Common Law** — is a constant call upon the reasoning powers of those engaged therein, keeping them unremittingly active. And especially it compels an unceasing looking into those laws, inherent in man and in society, without an understanding whereof no official person can properly discharge any governmental function.

§ 1317. **Further of Common-law Reasoning.** — In method and results the common-law lawyer resembles the scientist in nature. The latter, taking note of all natural phenomena, classifies them; and, looking down among them more deeply than the ordinary vision extends, discovers, and brings up to the view of his fellow-men the laws, one by one as he can find them, by which the workings of Nature are produced. Aided by his labors those who provide for the physical wants are able to proceed intelligently; as, to build a bridge which will not fall in the using, a house that will stand, a locomotive that will draw the train of cars. The scientist is thus constantly adding to our knowledge of what always existed, and the physical world of man is progressing.

§ 1318. So it is under the common law. The lawyer, whether practitioner, judge, or writer, looking down among the numberless phenomena of his science, — noting human actions, and investigating the decisions of the tribunals upon them, — discovers, one

by one, the laws which always existed, though, it may be, never before understood, pertaining to the government of men in communities. The exigencies of practice constantly compel him to this, if he is a practitioner; the duties of office compel him, if he is a judge. Thus, while the law does not in any proper sense grow, the knowledge of it is a constant growth of beauty and usefulness. And so men are taught governmental things, and kept in constant training for the work. And, —

§ 1319. Though not all officers of the government are lawyers, the non-professional ones, almost equally with the professional, feel the invigorating and enlightening influence of the reasoning law, — a flame which spreads from its main burning to the neighboring piles around.

III. *Further of the Common Law and its Needs.*

§ 1320. **Judicial Decisions — (Doctrines).** — That in our common law which is the most familiar, and which some even look upon as the whole of it, is its immense and rapidly increasing mass of judicial decisions. The nature and functions of a judicial decision are palpable, and absolutely certain beyond question. Yet many lawyers, as thoughtless as though the good God had never given them understandings, assume, and persist in assuming, that such a decision is a very different thing from what it is. It is the conclusion of the judicial mind upon particular facts. A controversy between parties had arisen, and to settle it they brought the facts to the tribunal and proved them; thereupon it pronounced the law's determination upon those facts, and it did nothing else. It could not, whatever the inclination of the judges, decide a question not in issue. And no issue upon an abstract doctrine, such as it is the province of a jurist to lay down, ever was or could be made up for the determination of the court. Therefore no such doctrine was ever judicially decided. Still, —

§ 1321. **Words of Judges.** — In pronouncing the law's determination upon the facts, the judge may have said many interesting and useful things, or possibly he may have blundered. But however wise or learned his words, they are the mere ornament of the adjudication, or his individual commentary thereon, spoken with reference to the special facts of the particular case. And,

however the words of one judge may be concurred in by the rest, they never rise higher than evidences of the law, as distinguished from the law itself. Moreover, even when they are in the most general terms, and to the casual reading meant to convey absolute doctrine as viewed separately from the limited facts in contemplation, they are to be interpreted as qualified by those facts. Thus, —

§ 1322. **Interpretation of the Words.** — There is nothing connected with our books of decisions more important to be remembered, or a forgetfulness of which oftener leads to mistake, than this, that the words of judges are always to be interpreted as qualified and limited by the facts of the case in hand; and that it is thus even when in form general, as laying down doctrines for all classes of facts. My attention was called to this proposition at an early period in my legal studies. I took down and preserved the language in which I first saw it; it proceeded from a very learned judge. When I came across the same thing from another learned judge, I preserved his words in like manner. I did the same in the next instance, and in the next, and so on until I became ashamed of this palpably needless repeating; then I stopped. I could fill out the remainder of the time allotted for this address with this sort of quotation.¹ It has been my fortune to read a great many thousand cases, and I never saw in any case anything contrary to this. It could not be otherwise. From the earliest times in England to the present in every one of our States, and in the tribunals of the United States, our judges have been men who, with only exceptions enough to emphasize the rule, had an eye single to the discharge of their duties. They have not meant to play the jurist while sworn to do the very different work of judge. To illustrate, —

§ 1323. It is laid down by a part of our courts, in the broadest and most general terms, that no man may abate a public nuisance unless he suffers from it in a manner special to himself, and not simply as one of the public. Were this really the doctrine of those courts, absolute, and not limited by the facts in contemplation when announced, then, if within their jurisdiction I stood on a railroad bridge spanning an immense chasm, and saw on the track an obstruction adequate to throw over a train of cars to the bottom, and saw approaching a train bearing a thousand souls,

¹ See, for an illustration of it, ante, § 839, note.

not one of whom was my wife or my child, and not one of whose lives I had underwritten, I should not be permitted to remove the obstruction; but I must stand and see these thousand human beings sent before my eyes to eternity, — to the horror of hell and the sobbings of heaven and earth. No, the judges who uttered this doctrine did it with their thoughts upon different facts, to which, therefore, it must be deemed limited.¹ Moreover, —

§ 1324. In reason, the rule for interpreting the enunciations of judges cannot be otherwise. One passing on given facts has necessarily them, not others, in his mind; or, if his thoughts go out to other facts, they are such as he deems illustrative; then, when he speaks, his utterance is simply of what is within him, not of something absent from his contemplations. So that a doctrine laid down by him, in however general terms, must, in the nature of the human mind, be his deduction only from what he sees, not from what he does not see. Now, —

§ 1325. **Ultimate Rules — (Narrow Facts of Decisions — Jurist Work).** — The result of all which is, that our books of reports are the judicial conclusions from just so many sets of narrow facts as there are cases in them, each set of facts differing from every other; and they do not embody the ultimate rules which govern the infinity of facts, past, present, and future. So long as the judges do their duty, and conform to their oath of office, the reports of their decisions cannot be otherwise. To ascertain and state the ultimate rules, and show how they are applied to the infinity of past, present, and future facts, is the proper work of jurists. And he who has learned what the jurists, thus viewed, have taught, has learned the law, and qualified himself to practise it; no other person has. I have thus stated the truth squarely and broadly, that its proportions may distinctly appear; while yet I gladly admit that in our reports will be found more or less of what approximates jurist work, and that with help ordinarily obtainable a man may imperfectly qualify himself for legal practice without reading jurist writings.

§ 1326. **Evil Method.** — There are lawyers who take immense pains to pile upon their memories these judicial deductions from specific facts, to the neglect of the ultimate rules. The human mind can bear a great deal of abuse without being utterly destroyed. Hence, those who do this are sometimes a long while

¹ And see ante, § 430-432.

in arriving at a knowledge of their mistake; they struggle on in fruitless attempts after recognition as great practitioners, until, fortunately coming upon a beam of light, they reform their method; or, what is more common, they die in wonder that God and man do not appreciate them. In some way, he who would make himself a success at the bar must learn what thus appears to be the law, in distinction from the multitudinous deductions from ever-changing facts.

IV. *Our Legal Text-books and Need of Jurists.*

§ 1327. **Ascertaining and arranging Principles.** — We are thus brought to the place in our common law where reform is demanded — the weak place, which needs to be strengthened. I can state only approximately the number of our adjudged cases. The labor of counting them would be too great to be compensatory. A rough estimate places them at half a million. The man does not live who, if he gave his whole time to ascertaining the judicial deductions from the differing facts they recite, could thus go through with the half of them; and, if this were accomplished, there never was a memory strong enough to stand up under the load; or, if there was, it would crush out the reasoning powers, and reduce the intellect to idiocy. Or, if nothing of this were true, the facts of the dead past are not the same as the living ones which will arise in the future. The past, therefore, is no precedent for the future, except as it furnishes the means whereby *study and investigation* can derive the rules which govern the past and the present alike.¹ To ascertain and set in order these rules is, we have just seen, no part of the work of judges. And if, the need being great, they make an effort toward it, it is often abortive.² It is considerate of a judge to do a thing of this sort when he has the time and facilities; but he discharges every particle of his duty, both his moral duty and his legal, when, in deciding a case, he gives his reasons for deriving the particular conclusion of the law from its special facts. And to pause upon a crowded docket, too heavy to be disposed of before the term must close, to write a jurist exposition of the general law of the subject is little less than to violate his oath of office.

¹ Ante, § 1289-1292.

² Ante, § 839, note, 908, 976, note.

If the public good requires the essay, the legislature should employ to write it some person whose time is less preoccupied with the public service. Hence, —

§ 1328. **Jurists.** — Fully as much as we need reporters of the decisions of the tribunals, almost as much as we need judges, we require legal persons of the very highest ability to ascertain and set down the reasonings of the law, in connection with what has been adjudged; deriving from all the doctrines, arranging them in their due order, and condensing them to their smallest proportions. And a decision should never be deemed a fit guide for the future until it has passed through the hands of a competent jurist. If the Roman jurists, to illustrate the applications of their principles, had possessed our printed reports of facts, how incomparably glorious would be their commentaries! Or if our law, with its multitudinous reports, had men like those jurists to present it for professional use, how immeasurably above what it now is would it practically be! But —

§ 1329. **Our Text-books.** — I am here reminded that we have immense numbers of legal text-books, and I am asked whether I deny that they proceeded from jurists. I reply, that they are of vastly differing qualities, and that no one characterization could properly be applied to all. Though the common law itself invites the culture of jurists, almost the sole thing which it has overlooked is the fact that they cannot live on uncooked electricity and air. They are not disembodied ghosts, but real men, requiring the same sort of subsistence on which practising lawyers and judges live. A jurist must have all the natural faculties which would qualify him to be a first class practitioner, or a judge of the highest eminence, added to which he must possess natural gifts not required of either. If the great lawyer must be refreshed with three pounds of roast beef per day, or the great judge with five, surely your jurist requires not less than ten. But how is a man whom God made to be a jurist to carry out the divine decrees? In England, there never was a time when any man could earn his salt by juridical writings. In the United States, where books purporting to be juridical have a wider sale, one who, to the naturally juridical mind, added the necessary culture, could obtain from his writings what would pay for his salt, his clothes if patched and second-hand, and his whiskey and tobacco, — were it not that, as fast as he wrote, the thieves would steal his work and publish it as their own. So that his

labor honest would come into competition with his labor stolen, reducing directly the profits, and indirectly, by mingling his expositions with those of the thieves, delay the recognition of his merits, whence naturally and legitimately would otherwise flow increased profits. The consequence whereof has been, that many or most who in England have essayed to write what should be juridical works have drawn largely on their predecessors by piracy; and the same thing has followed in this country. And the courts, instead of frowning upon this, have smiled upon it and petted it. There are even exceptional judges who will scarcely listen to a thing until it has been stolen at least once, and some appear to be happily satisfied only with about the seventh theft. Further as to —

§ 1330. **Stealing.**—It was once my fortune, in my younger days, to be present when one of the most eminent of law publishers was endeavoring to contract with a young author for a book. The author described the labor which the making of it would cost him, and added, "I cannot afford to do it for the price you offer." "Oh!" replied the publisher, "we do not expect you to do it so. There are two English books on that subject; cut them up, arrange the matter for yourself, work in with it a little American law, and we shall be satisfied. That is the way the old heads do. Why, in So-and-So's copy for the printer one could scarcely find any chirography."

§ 1331. Many years ago there were within the circle of my acquaintance two men who made a somewhat smaller law book than another then in use on the same subject. The larger book was the whale, and the smaller was Jonah. So the whale, in a plunge for life called a new edition, swallowed the choice parts of Jonah, — not the whole of him; I think it was something like one third. It may be a little more or less; for I speak only from memory, the verification having been made some years ago. So voracious was the whale that, though gobbling for head and heart, it got boots and spurs also. In other words, the printed matter of the smaller book appeared in the larger without the correction of those little mistakes which are unavoidable in books, having evidently been sent to the printer of the larger without copying. Jonah died, but the whale lives. It took at the same time a smaller gulp from another book, which survived, like the original Jonah; but, unlike him, was never cast up upon dry land. Nothing more of sufficient magnitude to be worth men-

tioning was ever done for the enlargement of the whale; and, to drop the figure, it remains now one of your honored books, progressing from edition to edition, and reverently cited by the bar, and bowed profoundly before by the judges.

§ 1332. In these days of rapid stealing, when type-writers and copyists "cover a multitude of sins" and avoid some of the former methods of detection, the scissors have, if I mistake not, somewhat declined as the newer and brighter glory has arisen. Of this complexion, I know a very modern case, not in the reports, wherein the pirate was so confident of having covered his stealings beyond detection as to allow a suit for an injunction to be brought, and remain in court until the judge had set down a day for the hearing; thus creating several hundred dollars more expense than would have settled the claim before suit. The purloining was in form like that of the burglar, who walks through the richest parts of the house, the parlor, the dining-room, and the china-closet, taking what seems most like gold and silver, and departs; then melts down his treasures sufficiently to destroy their identity. Travelling through the chosen chapters, he seized each coveted sentence, varied the expression, and shuffled the cited cases. But he did not obliterate the author's order, and he had no conception of the deathless nature of our English sentences. So that, in the better part of a hundred pages, he did not by his transmutings so alter a dozen sentences as to leave the question of their identity a fair subject for argument. When the folly of the mistake appeared in the light of an impending hearing, involving the introduction of one of your honored law books to the court in a manner not quite usual, and leading up to a luminous case for the reporter, it remained only for the complaining party to accept an honorable settlement. The stealing in this instance was not done with the scissors; for, though the original author's little errors were copied, adding to the evidences of the theft, the thief made similar little errors of his own, thus showing that his instrument was the pen.

§ 1333. A manner of making your honored text-books, not within any observation of mine, but in its results corresponding with what I have seen in books, was once related to me as follows. The man whose name is to stand on the titlepage as author selects the books to be stolen. With pencil in hand, he goes through them, and marks the coveted matter. Then he passes them to copyists, — supposed to be competent to cover while they scratch,

—directing them to change the expression as much as possible; lastly, he takes the copied matter, reduces it to the needful consistency by mingling with it his own brain-*aqua*, and with his mightier personal genius completes the work of destroying, or satisfying himself that he has destroyed, its identity. Even on this plan I am told that there is danger of slipping; for, as one observing upon it said, he had occasion to compare your honored text-books on a particular subject, and found an entire section in the new one made by this method identical with the section in the old.

§ 1334. It is not necessary for me to go on, under this head of the subject, with further particularizations of what you all in a general way know. The foregoing instances are but illustrations, selected, not because they are better or worse than others, but as showing some of the varieties of the stealing. The purpose is neither to injure nor benefit any particular persons living or dead; and, if there were a propriety in mentioning names, it would not be necessary, since I am addressing an audience of gentlemen who in their own libraries have the means of picking out the books if they choose. I will quote the words of a very competent writer in your neighboring State of Georgia, one who evidently wrote them without any idea that he was describing an abuse, but plainly deemed himself speaking of what existed as of course. "The more modern book," he says, "will usually repeat from the former all that part which is still in force, and it will give, besides, the subsequent alterations."¹ In other words, the author "usually" pirates the work of his predecessor, edits it, then publishes it as entirely his own production. I should insult you if I asked your opinion whether a scamp like this is a jurist. And still this writer informs us that such is your "usual" legal author, honored by the practising profession, and bowed before and followed by the judges.² But —

¹ Reed, Am. Law Studies, § 192.

² I have not the happy facility of prophecy, possessed by many others. In an excellent magazine article by Mr. Schouler, on "Cases without Treatises," he says, that a writer on jurisprudence at the present day cannot expect his work to be "lasting," like the great productions of former times; "or, at least, that it will continue to do its sol-

itary work, and advertise its writer, instead of being caught up and incorporated in new treatises, which deal with law and our complex society in a later and more comprehensive development." 23 Am. Law Rev. 6. If this means that the progress of the world will not end with the death of any author, I am glad of the prophecy. If it means, as it seems to, that stealing and lying will

§ 1335. **Copyright and False-pretence Laws.** — The noteworthy part of this matter remains to be stated. While our copyright laws, as commonly understood to be interpreted by the courts, are so defective as to seem almost worthless,¹ not so are the laws which punish cheating by false pretences. The latter exist in all our States, and the violators of them are shut up in the penitentiaries, except when the persons cheated are lawyers. One who, as author, presents to the public a book into which stolen matter enters, under the semblance of its being all his own, breaks the laws against obtaining money by false pretences, whenever and wherever an innocent bookseller sells a copy to one who purchases it relying on the representation implied in the semblance of authorship, whether the ostensible author is or is not present

continue; so that every worthy writer of to-day will to-morrow have his productions mingled with other gleanings of a thief, who will claim all as his own, and the world will embrace the thief and spurn the real authors, then I am very sorry for the world, doomed to such a retrograde into meanness and sin. For one, I am not good or goody enough to sacrifice much for any world which I might deem to be of that sort.

¹ Perhaps the common view as to their interpretation by the courts is not correct. It certainly ought to be otherwise. Our patent laws are construed in a way to give some protection to an inventor. But no invention in scientific literature, whether legal or any other, is supposed to have any real protection from the courts; because, it is assumed, *an idea* cannot be made the subject of a copyright, the protection extending only to *words*. So that, while the patent laws secure something to the inventor of a machine, no inventor of a scientific book takes anything under his copyright, except in the words and their arrangement, — two things which any fool can change at pleasure, and with very little labor. A man with the highest inventive powers, such as would yield him millions if employed in the mechanical field, may spend his entire life and starve his family in producing a scientific book bene-

ficial to mankind, then on the day of its publication another, with a facility of expression, and money enough to employ a type writer, may seize the book, and in a month have it before the public as his own; and, if the common understanding of our judicial doctrine is correct, the real author will get no help from the courts, while the thief piles in the proceeds of his sales, and stands and mocks at justice. And justice excuses herself by saying that ideas are not the subjects of copyright. Well, granted. Neither are they the subjects of patent. In both fields, men may entertain whatever ideas they please. But when a man, drawing from his own ideas and not stealing, constructs a new and useful *machine*, the statute of patents is given an interpretation which protects him as against all specious changes, wherein the form and appearance are altered while the principle remains the same. In reason, it should be so also with a *book*. There is no justice in denying the like construction to our copyright statutes. If there is a verbal justification for it, a quibble upon the statutory words, as is sometimes claimed, the statute should be amended; or, if not, either the courts should be convinced, or the legislature should furnish them the right rule of interpretation.

in the same county or State. And before a single sale is made, down to any time before the edition is exhausted, he is indictable for the criminal attempt to cheat. These are propositions which no one familiar with the criminal law will question. Yet, while the cheats which I have described have been going on, were the defrauders ever known to be set to hammering stone in a State prison? Surely their high position was not their protection. I do not know how you do things in South Carolina, but we in Massachusetts put into our penitentiary great lawyers, great senators, presidents of immense corporations, clergymen; and, in one instance, we received into it one of your honored South Carolina ex-governors. Why exempt your honored authors? It is easy to ask questions: so I have asked this one.

§ 1336. **Helpers.** — Another method of producing legal text-books is for an older man to mingle his work with that of boys helping. If this is done, not under the false pretence that the whole proceeded from the ostensible author, but accompanied by an honest statement to the public, there is no wrong in it; and the result may be, in some circumstances and for some uses, excellent. Where the aim is simply to set out the opinions of the courts, condensed, with little or no juridical work interwoven, and there is a large field to be gone over, this production of a dozen co-operative minds may be greatly better than no book. But it is not a jurist work. It matters not how eminent or how able a lawyer is, he cannot gather up and state the reasons and doctrines of the law at second-hand, traversing the juridical field beyond where the footsteps of the judges are distinct,—whether the helpers whose sight is to take the place of his own are competent or incompetent.

§ 1337. **Opinions** — greatly more disparaging of our text-books than my own might be added.¹ But, not dwelling upon them, —

V. *Conclusions as to the Reform demanded.*

§ 1338. **Admitted Need.** — In view of the foregoing, there are few reflecting lawyers who do not admit the crying need of

¹ In the address as delivered and elsewhere published, I present here some very strong testimony from our oldest University, Harvard, from the Law School of which all text-books have been banished to the extent that the reading of them is not a part of its course of legal instruction. I omit it partly because the question is one of mere opinion against opinion, chiefly because I wish to shorten this chapter.

reform. And, among those who attempt to penetrate, not with prophecy, but with the beam of reason, the mist-draped future, there are none who do not see that the course of juridical and judicial things among us must, sooner or later, change. In each of our States, the decisions of every other State, of England, and even of her colonies are accepted by the courts as *quasi* authority. Cases — not doctrines, but cases — from every region where the common law is practised, are piled high, case upon case, and then by counsel rolled down in enormous avalanches upon the mortals who have the misfortune to occupy the seat of justice. Each judge is to examine every case, or be derelict of duty. And the number of cases doubles every few years. The uncleared docket groans under its weight. A minority of the judges would not look into a jurist work, presenting clearly and concisely the *doctrine* which should govern a question, if cited to them. For the help of the majority, who would look, there is, speaking in terms substantially if not literally true, no such work to cite. A thief's book, a book made by a bunch of proxies, a good book which is simply an echo of the reports, an honest book written by one who has no command of principles and is therefore simply misleading, the book of a competent author who has not duly studied his subject, does not supply the need. Yet if, to fill the want thus appearing, jurist works were offered, the books of these various sorts would greatly crowd them aside, the stealings from them would leave unseen their merits, appreciation of them would come slowly, and more slowly the learning how to use them. Still —

§ 1339. **Jurist Works** — will come, or our law will be an utter wreck. *And they will come when demanded.* In the economy of our earthly existence supply is always commensurate with demand. But demanding implies also a readiness to receive. And receiving them, or demanding them, does not mean simply that you will not bring their authors to the public whipping-post, or shut them up in the penitentiary. You must give them in exchange for their labors something to eat and wear, and you must protect their products from the thieves. Especially you must enact, and, more than all, you must sustain by public sentiment, laws as efficacious for the preservation of the fruits of their intellectual toil as are those which protect the makers of jackknives from shop-breakers.

§ 1340. **Sufficient.** — Suitable jurist works, the ripened productions of real jurists, who wrote without the ghosts of hunger and

nakedness chasing them, with no bands of thieves hovering upon their lines, will reduce the labor of practising lawyers and judges to the smallest dimensions consistent with the administration of real justice. I assume, in this statement, that the practitioners will have learned how to use them, and that the courts will consent properly to consult them. I do not ask of the courts a pledge to follow so much as a solitary doctrine of theirs. That will come quite fast enough — too fast — without any pledge in advance. No man can have read a quarter of the cases which I have done without learning that every judge, including the most prejudiced, will follow the *accurate and properly explained and sustained* teachings of any book which he can be induced to read with due carefulness, that among ten thousand instances not a solitary exception to this truth can be found, and that the errors consist solely in judges accepting from text-books opinions which are not sound, or in not taking the trouble duly to comprehend the sound ones. In like manner, I do not ask counsel or judges to stop the enormous case-huntings, or the quiddlings over inaccurate judicial *dicta*; all that will come quietly and as of course, a dropping of ripened fruit into a golden harvest. Then will cease the clamor about the multiplying of the reports. Let them multiply. The jurists will use them, and others consult them who wish. To Sir Isaac Newton the fall of an apple suggested the law of gravitation; since which time, apples have more and more during the fruit-seasons come down, and philosophers have endured their peltings without complaint. When lawyers become true philosophers, the case-storm will give them no trouble. But I am told that this is almost —

§ 1341. **Codification.** — This is, not the premature and crude, but the just codification; lacking the needless yet fatal “Be it enacted,” — that evil part which transmutes the golden reason of the common law into the pig-iron of command.

§ 1342. If you have an enacted code, will you make it a punishable forgery, as Justinian did, to write so much as a line of comment upon it? Will you suppress your reports? Will you shut up in your prisons every man who attempts to be a jurist? Will you, doing what you now refuse, send to the penitentiary your thieves? If you do not, then your law reports, your poor text-books, your over-worked judges, and everything else you complain of, will multiply three-fold. Each command in your code, of the sort not interpreted as a mere affirmation of the

common law of reason, has now been made a technical rule, limiting and qualifying the reason of the law. Already the rules of this sort have become so numerous as enormously to swell the bulk of any adequate commentary upon the law.¹ So the unmanageable bulk will grow faster and be more complicated than before. If you codify a second time, the evils will only be multiplied; a third time, the same; and, at length, the confusion will have been rendered inextricable. Meanwhile our States, now by the affinities of a common jurisprudence happily wedded into the only polygamous Union consistent with prosperity, will, through the operation of their separate codes, suffer the most disastrous divorce ever known. But, —

§ 1343. As a practical question, we should bear in mind that the codification thus pictured is the ideal best form of it, neither possible nor by anybody suggested now. What is now commonly meant by codification is the reduction, not by jurists who have devoted their lives to the work, but by lawyers without special qualifications, of our present unkempt, uncombed, and uncultured common law, that never felt the jurist touch, into the form of a statute, and the adding thereto of the legislative screw, pressing and compacting it into the unelastic command. It is a tumult which may well remind us of the familiar quarrel between a husband and his wife as to where in their room to set the bureau. The domestic storm, you remember, rose so high that the priest had to be called in. Said the holy man, "Show me the bureau." "We have no bureau, your *riverence*, it has not been bought." Let me suggest, therefore, that we suspend our quarrel over this question of codification until our law has received such juridical culture as to inform us, and enable us to agree among ourselves, just what and how many are its elementary principles, reduced to their smallest proportions. We have already seen that to ascertain this is the proper work of the jurist; it is absolutely outside the functions of the judge, who can do it only by departing from his duty of relieving his docket from the press of cases upon it, and without the possibility of having before him the materials or tools indispensable to jurist work.

§ 1344. You remember that, at a not very remote meeting of the American Bar Association, it was, after debate, by a small majority resolved, that "the law itself should be reduced, so far as

¹ Ante, § 1303, 1304.

its substantive principles are settled, to the form of a statute.”¹ And you remember that, for a considerable time past, there has been in New York a chronic quarrel as to whether or not a particular draft of a code shall be legislatively adopted. Now, if this or any other proposed code truly embodies the principles of the common law reduced to their smallest proportions, the courts can be made to know the fact more readily than the legislature. And if this great juridical work has really been done, we may well set up here our Ebenezer. Any man who has done it has only to publish the book; and, if the world is sufficiently enlightened, it will receive it. What is already established does not need to be established by a second process to make it stand. The utility of the writing can be made as well to appear without the legislature passing upon it as with. And after its utility has become universally recognized, — after the bureau has been bought, — its position, whether among the written laws or the unwritten, can be more intelligently determined upon than before.

§ 1345. You will call to mind that a well-known English advocate of codification, Mr. Justice Stephen, has prepared and published what he proposes for codes. That, so far, is an attempt at something like jurist work. Let our American advocates of codification do the same; and, when they have produced what all our courts accept as the embodied principles of the common law, reduced to their smallest proportions, the further question of their legislative enactment will present itself, not prematurely, but at its proper time. Then, if the codification doctrine as expounded by the American Bar Association prevails, we shall have the multiplication table and the entire arithmetic (“substantive principles” of law well compacted and “settled”), together with all the learning of the schools, put into form for the use of pupils, under the name of a statute. Now, —

§ 1346. “**Best Minds.**” — I freely admit that, as uniformly claimed by the advocates of this sort of legislation, and conceded by every one of its opponents, they who favor it include all the “best minds” in our profession both in England and the United States. Still we who cannot see the superior truth ask leave to retain our opinions so long as we do not boast. Let us, therefore, pause a moment upon this codification plan viewed as an arm of our public —

¹ Report for 1886, p. 74. Ayes 58, noes 41.

VI. *Education for Governmental Functions.*

§ 1347. **From Reason to Command.** — In one aspect, were it possible to codify the common law in terms which would avoid questions of interpretation, — a feat never yet accomplished in any legislation, — so that all would understand the code to mean what the common law did, and nothing further or different, judicial things might appear to go on afterward much as they did before. Of course, there could be no pretence that any good has been done, for neither in form nor in substance is there any change. What was settled before is no more than settled now. But, in another aspect, the change is vast. You have dropped from reason to the legislative “Be it enacted.” To illustrate, —

§ 1348. If one brings suit for building a fence which is the hypotenuse of a right-angled triangle, for which he was to be paid an agreed sum per rod, and the lengths of the perpendicular and base are severally proved, but not that of the hypotenuse, the length of the latter is matter of law, and the proofs are adequate. Now you enact a code providing that the square of the hypotenuse of a right-angled triangle shall equal the sum of the squares of the perpendicular and base. You will remember that, under the old system, if a boy in a class asked his master how this could be, the latter would draw the triangle on the blackboard, extend his lines, and show how the problem is reasoned out. The boy's brain would be stirred, a step would be taken in teaching him to think. Under the new system, the master would say: “This is provided for by the one thousand three hundred and fiftieth section of our glorious code. It was explained by an old Greek named Euclid. Perhaps it was discovered before; at any rate, it has long been settled. In the year 1886, there was a meeting of great lawyers at Saratoga, and fortunately the best minds were in the majority. Saratoga, please note, is a place of water; hence it is certain that these best minds were not drunk. They resolved that whatever is settled should be enacted into a statute. Our legislature had the wisdom to follow the light; therefore, until the statute is so changed as otherwise to provide, the sum of the squares of the perpendicular and base shall be and remain the square of the hypotenuse. Now, boys, remember that this is the rule for what are termed the braces in all

buildings. It is understood that the wicked political party, to which we do not belong, propose to change this statute, and make the square of the perpendicular equal to the sum of the squares of the hypotenuse and base. That change, it has been ascertained, will overturn every building in the State, and it is uncertain whether people can protect themselves by digging holes in the ground and getting into them. The better opinion is that, in this event, all things on the surface of the earth will be precipitated into its internal fires. To avoid this, as soon as you are old enough to vote, go to the polls; and, under the pressure of dire necessity, you may be required to vote, not only early, but often." Now, —

§ 1349. **Practically**, — you say, the codification plan will not be carried to this absurd degree. And as to this particular problem in mathematics, doubtless it will not be. But, if one thing already "settled" is to be turned into a statute, so that lawyers and courts will no more reason about it, why not everything, as the resolution in contemplation demands? The proposition, in terms unlimited, is certainly meant to be of wide application. And, so far as the code extends, it works the oblivion of reason, and leaves so much less of it in the community. Our governmental affairs now stagger — our ship of state reels and plunges — because of the lack of reason. As fast as the practice of reasoning is taken away, so fast do our governmental dangers thicken and multiply. And —

§ 1350. **Law** — is the only profession which teaches the sort of reason that governs the State. The lawyers, as already said, are the judges, and they are the great majority also of the executive and legislative branches of the government. Should the cry for codification, under the eternal aspiration for laziness, prevail, and the element of reason which the practice and administration of the common law have carried into governmental affairs, be banished therefrom, the hitherto common-law nations will quickly cease to be leaders in the civilized world.

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